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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA,* in his official capacity as Secretary of Health and Human Services, *et al.*,

Defendants.

Case No. 3:20-cv-6018-MMC

PLAINTIFFS' NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hearing Not Yet Scheduled.

* Under Rule 25(d) of the Federal Rules of Civil Procedure, Mr. Becerra is automatically substituted as a party for former Secretary of Health and Human Services Alex Azar, and JooYeun Chang is automatically substituted for former Assistant Secretary for the Administration for Children and Families Lynn Johnson.

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on an as yet to be scheduled date and time when this matter may be heard, in Courtroom 7, 19th Floor, of the San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Judge Maxine M. Chesney of the United States District Court for the Northern District of California, San Francisco Division, Plaintiffs will and hereby do move the Court pursuant to Federal Rule of Civil Procedure 56 for an order granting summary judgment against Xavier Becerra, in his official capacity as Secretary of Health and Human Services; Jooyeun Chang, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families; the U.S. Department of Health and Human Services; and the Administration for Children and Families. This Motion is based on this Notice of Motion and Motion for Summary Judgment, the following memorandum of points and authorities, the accompanying declarations and exhibits, the pleadings and papers on file in this action, and such other matters as the Court may consider.

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INTRODUCTION

In 2016, the Department of Health and Human Service ("HHS") and its Administration for Children and Families ("ACF") updated the requirements for the Adoption and Foster Care Analysis and Reporting System ("AFCARS") for the first time in 23 years. *See* Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524, 90,525 (Dec. 14, 2016) ("2016 Final Rule"). Among other new requirements, the 2016 Final Rule required the collection of demographic data on one of the most overrepresented groups within state child welfare systems: LGBTQ+ youth.[1] It also mandated data collection on the application of the requirements of the Indian Child Welfare Act ("ICWA") to another overrepresented group, American Indian and Alaska Native ("AI/AN") youth. ACF identified numerous ways that this data would aid the federal government, state agencies, tribes, groups that support youth in the child welfare system, and the children themselves.

After a change in administration, however, Defendants prevented those requirements from taking effect by first delaying, and then gutting, the 2016 Final Rule. Based on purported concerns about the burden on state child welfare agencies, Defendants eliminated the principal sexual orientation questions and the majority of the ICWA questions. Adoption and Foster Care Analysis and Reporting System, 85 Fed. Reg. 28,410, 28,411 (May 12, 2020) ("2020 Final Rule").

These changes violated Defendants' obligations under the statute requiring it to collect AFCARS data, 42 U.S.C. § 679(c), and was arbitrary and capricious under the Administrative Procedure Act ("APA"). Although Congress explicitly required Defendants to collect data on the "demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents," *id.* § 679(c)(3)(A), Defendants eliminated the questions about sexual orientation—a key demographic characteristic—without even considering whether doing so was consistent with the statute. Their analysis in the 2020 Final Rule is also independently illegal because it was

[1] As used in this brief, "LGBTQ+" includes lesbian, gay, bisexual, transgender, questioning, and two-spirit youth, as well as other terms youth may use to describe their sexual orientation, gender identity, and gender expression. For purposes of this case, there is no material difference between this and similar terms used in documents quoted herein, such as "LGBT" or "LGBTQ."

riddled with core APA violations. It ignored important aspects of the problem, offered explanations that were contrary to the evidence before the agency, disregarded facts and circumstances that underlay the prior policy, and refused to respond meaningfully to significant comments. Accordingly, it must be set aside. *See* 5 U.S.C. § 706(2)(A).

Plaintiffs have standing to bring this case. Plaintiffs here include the largest federally recognized tribes in California and in the United States, a coalition of dozens of tribes located in California, a foster youth and foster care alumni organization in Alaska, and three organizations from around the country that work with LGBTQ+ foster youth and/or youth who have experienced sex or labor trafficking. Each of these Plaintiffs works to improve the living conditions of youth in child welfare systems and to reduce the chance they will end up homeless, incarcerated, or otherwise severely harmed while in care. The data that Defendants have abandoned are irreplaceable for the efficacy of these efforts. The 2020 Final Rule substantially impedes Plaintiffs' ability to pursue their missions. It makes it harder for tribes to vindicate their and their children's rights and to protect their children's well-being. Likewise, the rule makes it more difficult for groups serving youth in care, including LGBTQ+ youth, to address the overrepresentation of those youth in the foster care population and to prevent their disproportionately negative experiences. The 2020 Final Rule thus injures Plaintiffs—along with the vulnerable children they serve.

BACKGROUND

I. Overview of the Child Welfare System

At any given time, nearly 500,000 children in the United States are in state foster care or have been adopted through a state agency. Compl., ECF No. 1, ¶ 57.[2] To support the state child welfare systems that serve these children, the federal government spends nearly $10 billion a year. *Id.* ¶ 54. Congress allocates most of this money through title IV–E and IV–B of the Social Security Act (the "Act"). Under title IV–E, states are partially reimbursed for providing foster care,

[2] Unless otherwise noted, all citations to the Complaint are to paragraphs or portions of paragraphs admitted in Defendants' Answer, ECF No. 53, which may be relied upon for purposes of summary judgment. *See Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980).

adoption assistance, and guardianship assistance. Under title IV–B, states and tribes obtain grants for services that protect children from abuse or neglect, preserve and reunite families, and promote and support adoption. *See* 42 U.S.C. §§ 621, 624, 670, 674. Agencies that receive this funding are commonly referred to as "title IV–E agencies." This case focuses on two highly vulnerable groups that are overrepresented in the child welfare system.

LGBTQ+ Youth—As ACF recognized in a 2011 Information Memorandum, studies reveal that "LGBTQ youth are overrepresented in foster care." AR 2853. While LGBTQ+ people represent approximately 5 to 10 percent of the general U.S. population, studies indicate they account for nearly 20 percent of youth in the foster care system. AR 2853, 2934.

Federally funded studies also demonstrate that LGBTQ+ youth experience disproportionately negative treatment and outcomes after entering the child welfare system. LGBTQ+ youth are more than twice as likely to report being treated poorly within the child welfare system as their non-LGBTQ+ peers. AR 1222. LGBTQ+ foster youth also cycle through higher numbers of total placements, higher rates of placement in group homes, longer stays in residential care, higher rates of homelessness, greater rates of hospitalization for emotional reasons, and greater rates of justice system involvement. AR 1222, 1514, 2854. Despite the grim reality outlined by studies, "there is little or no [national] data on the experiences of these youth," 80 Fed. Reg. 7132, 7155—making it "impossible to track whether the system is . . . improv[ing] in the treatment and care of this very vulnerable . . . population," AR 1512.

Additionally, LGBTQ+ foster and adoptive parents can provide stable, healthy homes for LGBTQ+ youth in care, but are a "significant untapped resource in the effort to find permanent families for all children . . . in foster care." AR 2938; AR 2858-59. Nevertheless, LGBTQ+ parents have historically experienced significant discrimination when seeking to adopt or foster. *See* AR 2858. And even states that welcome LGBTQ+ foster and adoptive parents lack data to help them recruit and support those caregivers. *See* AR 2938.

AI/AN Youth—AI/AN youth are similarly overrepresented "at a rate of 2.7 times greater than their proportion in the general population." AR 2494. Many of these children are placed in non-tribal homes, continuing a long history of removing AI/AN youth from their families on a

large scale with severe consequences for tribal communities. AR 2244-45.

In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") to address the "high percentage of Indian families . . . broken up by the removal . . . of their children." 25 U.S.C. § 1901(4). In doing so, Congress recognized that children are a vital resource "to the continued existence and integrity of Indian tribes" and declared that it was national policy to "protect . . . Indian children and to promote the stability . . . of Indian tribes and families." *Id.* §§ 1901(3), 1902. ICWA provides protections to AI/AN children who meet the statutory definition of "Indian Child," *id.* § 1903(4), and imposes requirements that states must follow in custody proceedings involving those children. These include, among other things, that parties seeking to terminate parental rights or make a foster care placement notify the child's tribe and parents of proceedings, *id.* § 1912(a); that such parties demonstrate to the court that they have made active efforts without success to prevent the breakup of the family, *id.* § 1912(d); that such parties prove that continued custody by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child, *id.* § 1912(e)-(f); and that child welfare agencies comply with placement preferences that prioritize placing children with extended family members and/or within their tribal community, *id.* § 1915. Additionally, the child's tribe has a right to intervene and may petition to transfer the proceeding to tribal court jurisdiction. *Id.* § 1911(b)-(c).

As discussed further below, *see infra* 7-8, it is "unclear how well state agencies and courts have implemented ICWA's requirements into practice." 81 Fed. Reg. 20,283, 20,284. This is caused by a "confusion regarding how . . . to apply [ICWA]," even in "states with large AI/AN populations." *Id.* ACF has recognized that addressing these issues is "complicated" by the lack of "comprehensive national data on the status of AI/AN children for whom ICWA applies." *Id.*

II. The Adoption and Foster Care Analysis and Reporting System

To improve the wellbeing of children in foster care and their life outcomes, maximize the benefit of the government's child welfare expenditures, and ensure that child welfare agencies know the demographics and needs of the children in their care, Congress passed a series of laws between 1978 and 2014 that first authorized and then required HHS to develop a comprehensive reporting system, which became AFCARS. *See* 42 U.S.C. § 679(c); Compl. ¶¶ 58-60.

Pursuant to the Social Security Act, AFCARS must:

> (3) provide comprehensive national information with respect to--
>
> (A) the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents,
>
> (B) the status of the foster care population (including the number of children in foster care, length of placement, type of placement, availability for adoption, and goals for ending or continuing foster care),
>
> (C) the number and characteristics of--
>
> (i) children placed in or removed from foster care,
>
> (ii) children adopted or with respect to whom adoptions have been terminated, and
>
> (iii) children placed in foster care outside the State which has placement and care responsibility,
>
> (D) the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided; and
>
> (E) the annual number of children in foster care who are identified as sex trafficking victims--
>
> (i) who were such victims before entering foster care; and
>
> (ii) who were such victims while in foster care; and
>
> (4) utilize appropriate requirements and incentives to ensure that the system functions reliably throughout the United States.

42 U.S.C. § 679(c)(3)-(4). The AFCARS data collection must also "avoid unnecessary diversion of resources from agencies responsible for adoption and foster care." *Id.* § 679(c)(1).

After collecting the data, ACF must "disseminate the data and information made available through" AFCARS via the National Adoption Information Clearinghouse, a public database that centralizes information related to child welfare, adoption, and foster care. *Id.* § 679a(4). The full AFCARS dataset is available through the National Data Archive on Child Abuse and Neglect to those who complete an application process. Answer ¶ 63; *see also* Compl. ¶ 63 (admitted in part). States and tribes that receive funds under title IV–B or title IV–E of the Social Security Act are required to report information to AFCARS as prescribed by ACF's regulations. Compl. ¶ 64. ACF

reimburses 50 percent of states' expenditures to "develop, install, and operate data collection . . . systems" that comply with AFCARS requirements. 42 U.S.C. § 674(a)(3)(C), (c).

III. Regulatory History

A. 1993 Rule

AFCARS currently operates under regulations issued in 1993.[3] *See* Title IV–B and IV–E of the Social Security Act: Data Collection for Foster Care and Adoption, 58 Fed. Reg. 67,912 (Dec. 22, 1993) ("1993 Rule"). The 1993 Rule required states to report a limited number of data elements about foster and adopted youth, including date of birth, sex, race, the circumstances of a child's removal from a home, the presence of abuse or neglect, previous placements, details of the current placement, adoptive parents, the length of time youth remain in foster care, information about their caretakers, and whether parental rights are terminated. *See id.* at 67,912, 67,926-27.

In devising the 1993 Rule, ACF recognized that AFCARS data provides broad benefits to diverse stakeholders, including Congress, states, federal agencies, tribes, child welfare advocates, and researchers—and ultimately youth in care themselves. Comprehensive data would "enable policymakers to assess . . . why children are in foster care and develop remedies to prevent it." *Id.* at 67,912. This data would also help policymakers "to gain a better understanding of the foster care program" and "eventually . . . to improve the child welfare system." *Id.* ACF expected that the data would be a "catalyst" for local improvement, "allow[ing] and encourag[ing] States to manage programs more effectively." *Id.* at 67,915. It would also "strengthen and preserve family life insofar as the demographic information provided on children in foster care will aid in permanency planning[4] for these children and their families." *Id.* at 67,923.

ACF identified several purposes for which it would use the data, including budget projections; trend analyses and planning; targeting areas for technical assistance efforts, discretionary service grants, research/evaluation, and regulatory change; and justification for policy changes and legislative proposals. *Id.* at 67,912. ACF also explained that it would use the

[3] As explained below, *infra* 15, states will not need to comply with the 2020 Final Rule until 2022.

[4] In the child welfare setting, achieving "permanency" means exiting care to a permanent family-based living situation, whether that is reunification with the parent(s), guardianship, or adoption.

data "to respond to questions and requests from other Departments and agencies." *Id.*

B. 2003–2016 Rulemaking

1. Need for Revision to AFCARS Requirements

As early as 2003, HHS recognized in public reports that the data collected under the 1993 Rule was insufficient.[5] These reports, together with the passage of the Adoption Promotion Act of 2003, Pub. L. No. 108–145, 117 Stat. 1879, prompted ACF to request public comment on potential improvements to AFCARS. Compl. ¶ 94. This led to a rulemaking effort that took 13 years to complete. ACF issued notices of proposed rulemaking ("NPRMs") in 2008 and 2015, a supplemental NPRM ("SNPRM") in April 2016, and ultimately a final rule in December 2016.[6] Throughout this rulemaking process, ACF recognized that AFCARS's ability to fulfill the agency's goals was hampered by the limited scope of AFCARS data elements. Of most relevance to this case, ACF noted the significant absence of comprehensive national data on the demographics and status of both LGBTQ+ youth and AI/AN youth.

First, ACF recognized that "[r]esearch has shown that LGBTQ youth are often overrepresented in the population of youth served by the child welfare system and in the population of youth living on the streets." 80 Fed. Reg. at 7155. However, ACF observed, "there is little or no data on the experiences of these youth." *Id.* Therefore, ACF requested comment in the 2015 NPRM on whether and how to collect "data relating to LGBTQ statuses." *Id.*

Second, ACF noted that "there is no comprehensive national data on the status of AI/AN children for whom ICWA applies at any stage in the adoption or foster care system." 81 Fed. Reg. at 20,284. As a result, "it is unclear how well state agencies and courts have implemented ICWA's requirements into practice" and there was "confusion regarding how and when to apply the law" even in "states with large AI/AN populations." *Id.*

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[5] *See, e.g.*, HHS OIG, OEI-07-01-00660, Adoption and Foster Care Analysis and Reporting System (AFCARS): Challenges and Limitations (2003), https://oig.hhs.gov/oei/reports/oei-07-01-00660.pdf (discussing the limitations of existing AFCARS data).

[6] Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 90,524 (Dec. 14, 2016) ("2016 Final Rule"); 81 Fed. Reg. 20,283 (Apr. 7, 2016) ("2016 SNPRM"); 80 Fed. Reg. 7132 (proposed Feb. 9, 2015) ("2015 NPRM"); 73 Fed. Reg. 2082 (Jan. 11, 2008) ("2008 NPRM").

ACF found that "AFCARS data can bridge this gap." *Id.* Specifically, collecting ICWA data would serve "several uses in the public interest including: To assess the current state of foster care and adoption of Indian children under the Act, to develop future national policies concerning ACF programs that affect Indian children under the Act, and to meet federal trust obligations[.]" *Id.*; *see also id.* at 20,284-86 (identifying additional ways ACF will use the data). These uses reflected "Department-wide priorities to affirmatively protect the best interests of Indian children and to promote the stability and security of Indian tribes, families, and children." *Id.* at 20,284. Collecting ICWA data elements also implemented the Social Security Act's mandate for AFCARS because doing so would "provide more comprehensive demographic and case-specific information." *Id.*; *see id.* at 20,288. Accordingly, ACF proposed to include a series of data elements on how the state agency implemented ICWA in a child's case. ACF detailed the need for and benefit of each specific element. *Id.* at 20,288-91. ACF also identified alternatives that it had considered and rejected, noting that "including too few data elements . . . may exclude Indian children and families from the additional benefit of improving AFCARS data." *Id.* at 20,295-96.

2. 2016 Final Rule

In response to the 2015 NPRM and 2016 SNPRM, ACF received 217 comments from states, tribes, public interest groups, universities, and private citizens. 81 Fed. Reg. at 90,525-26. After considering comments, ACF issued a 74-page Final Rule adopting many of the proposed data elements, but "remov[ing]" and "modif[ying] others" in response to comments. *Id.* at 90,524. In support of its determination, ACF explained that the "more comprehensive information" collected by the 2016 Final Rule would "deepen [ACF's] understanding of guardianships" and help "address the unique needs of Indian children as defined in ICWA." *Id.* at 90,525.

The 2016 Final Rule included data elements on most of the topics proposed in the 2015 NPRM and 2016 SNPRM, including health assessments; health, behavioral, and mental health conditions; school enrollment; educational stability; transition planning; sexual orientation; ICWA; and sex trafficking. *See id.* at 90,539-41, 90,550, 90,552-56. In various places, it deleted, modified, or clarified the newly proposed data elements in response to comments from title IV–E agencies and others. For example, in response to comments from title IV–E agencies, ACF deleted

data elements regarding whether children had qualifying disabilities under the Individuals with Disabilities in Education Act. *Id.* at 90,534. ACF also considered alternative agency actions, including "whether other existing data sets could yield similar information." *Id.* at 90,565. These alternatives were ultimately rejected as insufficient because "AFCARS is the only comprehensive case-level data set on the incidence and experiences of children who are in out-of-home care." *Id.*

LGBTQ+ Youth and Adults—Regarding sexual orientation, ACF was "persuaded" by commenters that "we do not have a full picture of [LGBTQ+ youth's] experiences in foster care," even though they "are overrepresented in the child welfare system," "have unique service needs, are at an increased risk for poor outcomes," and "experience more placements." *Id.* at 90,534. Accordingly, the Final Rule required title IV–E agencies to report (1) the voluntarily self-reported sexual orientation for youth age 14 and older; (2) the voluntarily reported sexual orientation of foster parents, adoptive parents, and legal guardians; and (3) whether there was family conflict related to the child's sexual orientation, gender identity, or gender expression at removal. *Id.* at 90,526, 90,534, 90,554, 90,558-59. ACF noted that this data would "better support children and youth in foster care who identify as LGBTQ" by "ensur[ing] that foster care placement resources and services are designed appropriately," and by "assist[ing] title IV–E agencies in recruiting and training foster care providers in meeting the needs of these youth." *Id.* at 90,534-35. Further, the sexual orientation data for prospective foster parents, adoptive parents, and guardians will help "recruit[] . . . and retain[] an increased pool" of homes for children in care. *Id.* at 90,554, 90,559.

ACF acknowledged that some title IV–E agencies opposed the sexual orientation elements. These agencies argued that the elements, which call for a voluntary response, could result in an undercount of LGBTQ+ children in foster care; that sexual orientation data is sensitive; and that collecting the data could pose safety concerns due to the risk of discrimination. *Id.* at 90,534. ACF considered but rejected those concerns. It rejected the sensitivity concern because youth could decline to disclose their sexual orientation and because child welfare databases are subject to confidentiality requirements. *Id.* at 90,535. ACF also noted that state agencies and advocacy organizations "have developed guidance and recommended practices" for addressing sexual orientation in child welfare settings, in addition to resources provided by ACF itself. *Id.* at 90,526.

ACF also rejected commenters' requests to include additional data elements asking about gender identity or gender expression, or to include additional response options. Instead, it chose to make the sexual orientation response options identical to demographic data routinely gathered on sexual orientation by the Centers for Disease Control and Prevention ("CDC") through its Youth Risk Behavior Surveillance System questionnaire. *Id.* at 90,534.

AI/AN Youth—As to AI/AN youth, ACF concluded that "the benefits outweigh the burden associated with collecting" "national data on children subject to ICWA." *Id.* at 90,527-28. By collecting such data for the first time, ACF would be able to "assess the experiences of AI/AN children in child welfare systems" and "target guidance and assistance to states." *Id.* at 90,527. ACF also noted benefits highlighted by commenters, including that such data would "help address . . . the disproportionality of AI/AN children in foster care" by "prevent[ing] AI/AN children from entering the foster care system." *Id.* Those commenters believed that "collecting ICWA-related data in AFCARS is a step in the right direction to ensure that Indian families will be kept together[.]" *Id. See also* 81 Fed. Reg. at 20,284-85 (discussing benefits in depth).

In light of these benefits, ACF retained most of the ICWA data elements and explained its rationale for each element. *See id.* at 90,535-39, 90,545-48, 90,552-53, 90,556-58, 90,560-61. Consistent with the 2016 SNPRM, the first three elements were designed to assess whether ICWA applies and whether the title IV–E agency had made the statutorily mandated inquiries about a child's ICWA status. *Id.* at 90,535-37. These data elements were "essential" because they would "provide a national number of children in . . . out-of-home care . . . to whom ICWA applies." *Id.* at 90,536. ACF explained that such data would also help determine whether title IV–E agencies "need resource[s] or training to support [their] inquiry" efforts, *id.* at 90,535, which are in turn critical to ensuring that ICWA youth are identified and receive ICWA's protections, *see id.* at 90,536. For roughly 98 percent of children (*i.e.*, all those to whom ICWA does not apply), those three elements were the only ICWA-related data that agencies would need to provide.

For the roughly 2 percent of cases in which ICWA applies, the 2016 Final Rule also required title IV–E agencies to answer a broader set of questions tracking whether and how ICWA's protections had been implemented. Again, the 2016 Final Rule explained the need for

each element, each of which was intended to help the federal government improve ICWA's implementation and secure better outcomes for AI/AN youth. For example, one data element required title IV–E agencies to report whether a court made certain statutorily mandated evidentiary findings before removing an ICWA child from their parents' home. *Id.* at 90,548. ACF explained that the "removal data elements will provide data on the extent to which . . . ICWA [children] are removed in a manner that conforms to ICWA's standards" and will "help[] identify needs for training and technical assistance[.]" *Id.* Further, the removal standards provide "important protections" by "prevent[ing] the breakup of Indian families[.]" *Id.* at 90,546.

ACF noted that states and organizations representing state child welfare agencies "generally supported the overall goal and purpose of including ICWA-related data." *Id.* at 90,527. ACF also addressed several concerns raised by commenters, including the "burden" of collecting the data, but ultimately determined that the "benefits outweigh the burden." *Id.* at 90,528. ACF explained that it "careful[ly] consider[ed] input received from states and tribes," as well as an estimate of the burden that "us[ed] the best available information." *Id.* at 90,566. Notably, these estimates accounted for the fact that the majority of the ICWA data elements would apply in only 2 percent of all cases. *See id.* at 90,568 (assuming agencies would spend on average 3 hours per case gathering and entering data for non-ICWA children, and 10 hours per case for ICWA children). At the same time, ACF considered and rejected alternatives that would have added data. ACF rejected, for example, a request from tribes to require agencies to report "data that accurately reflects tribal involvement" in custody proceedings, noting that ACF "must balance the need to have the information with the burden and cost it places on state agencies[.]" *Id.* at 90,536.

Although most states indicated that they would need more than a year to prepare to comply with the 2020 Final Rule, only two states said that they would need as much as two or three years. *Id.* at 90,529. To assure ample time, the 2016 Final Rule nevertheless provided two years to implement the required changes, setting the compliance date of October 1, 2019. *Id.*

IV. The 2020 Final Rule

A. 2018 Delay, 2018 ANPRM, and 2019 NPRM

After a change in administration, Defendants set out to prevent the 2016 Final Rule from

ever taking full effect. Instead of providing technical assistance to help title IV–E agencies meet their new obligations—as promised in the 2016 Final Rule, *see, e.g.*, *id.* at 90,563-65; Compl. ¶ 134—Defendants began laying the groundwork to gut the 2016 Final Rule.

First, Defendants proposed to delay the compliance date, even though the 2016 Final Rule provided more time than requested by all but two states. Although the majority of comments they received opposed any delay, Defendants nevertheless delayed implementation by a year without any analysis of the effect on youth in foster care, families, tribes, or other interested parties. *See* Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 42,225 (Aug. 21, 2018). Around the same time, Defendants also issued an ANPRM seeking suggestions for "streamlining" the data elements. Adoption and Foster Care Analysis and Reporting System, 83 Fed. Reg. 11,449, 11,449 (proposed Mar. 15, 2018) ("2018 ANPRM"). Although the 2016 Final Rule had included a detailed analysis of the burden placed on title IV–E agencies by the new requirements, *see* 81 Fed. Reg. at 90,567-68, the 2018 ANPRM assumed that there were "data elements … that are overly burdensome" and asked commenters to identify them, along with "specific recommendations on which data elements in the regulation to remove." 83 Fed. Reg. at 11,450.

In response, Defendants received 237 comments, including comments from 38 states. Most, although not all, states took up Defendants' invitation to claim that the requested data elements were overly burdensome, with some claiming that it would take as many as 95,000 hours—the equivalent of 47.5 people working full-time for a year. 84 Fed. Reg. 16,572, 16,573. However, only one-third of the states proposed to cut the sexual orientation elements and roughly half of the states recommended eliminating some of the ICWA elements. *Id.* at 16,574. By contrast, at least five states urged Defendants to retain the sexual orientation elements, and at least three states expressly requested that it retain many or all of the ICWA elements. Compl. ¶ 147.

When discussing the comments, Defendants ignored the former altogether and misstated the latter. For example, Defendants claimed that "states with higher numbers of tribal children in their care reported that they supported including *limited* information related to ICWA in AFCARS," 84 Fed. Reg. at 16,574 (emphasis added), when in actuality the state with the largest number of AI/AN youth in care, California, expressed "steadfast and unequivocal support for the

data collection set forth in the [2016] final rule, including the . . . ICWA and LGBTQ information." AR 720. Nor did Defendants even acknowledge that some of the tribes that submitted comments have title IV–E agencies—which are required to comply with most AFCARS requirements—and that all opposed the proposed streamlining. *E.g.*, AR 1060.

The vast majority of non-state commenters likewise opposed the proposed retrenchment, and Defendants' analysis similarly misstated those comments. For example, Defendants claimed that commenters supporting the requirements of the 2016 Final Rule "did not provide specific comments on . . . cost or burden[.]" 84 Fed. Reg. at 16,574. However, numerous commenters explained that states' burden estimates were overstated because, *inter alia*, much of the burden of updating states' systems would exist regardless of the ICWA data elements; many states had already begun updating their systems and incurring costs; and title IV–E agencies would need to answer only 3 out of 24 ICWA-related data elements in 98% of cases. AR 761, 988, 2781, 2898.

Defendants issued a new NPRM on April 19, 2019. Adoption and Foster Care Analysis and Reporting System, 84 Fed. Reg. 16,572 (proposed Apr. 19, 2019) ("2019 NPRM"). The sole stated purpose of the NPRM was "to reduce the AFCARS reporting burden." *Id.* at 16,572. In keeping with Defendants' single-minded focus, the 2019 NPRM's "Costs and Benefits" section did not acknowledge *any* benefits that would be foregone by eliminating data elements. *See id.* Instead, it focused solely on the "costs . . . attributable to the 2016 final rule." *Id.* Likewise, when discussing specific data elements, the NPRM omitted any analysis of the extensive benefits Defendants had identified, including developing a more comprehensive picture of a child's experience in care, when proposing and enacting the 2016 Final Rule.

Guided by this imbalanced valuation, Defendants proposed to eliminate the data elements about the sexual orientation of youth in foster care age 14 and older and their foster parents, adoptive parents, and legal guardians; most of the ICWA-related data elements; and various data elements regarding health assessments, educational stability, and other issues. *Id.* at 16,576.

As discussed further below, Defendants' rationales for these changes were brief, conclusory, and contrary to their 2016 conclusions. As justification for cutting the sexual orientation questions, the 2019 NPRM relied primarily on the sensitivity concern explicitly

considered and rejected in 2016. *Compare* 84 Fed. Reg. at 16,576 *with* 81 Fed. Reg. at 90,526, 90,535. Similarly, the 2019 NPRM proposed eliminating the majority of ICWA-related data elements even though Defendants had found just three years earlier that each one was essential. *Compare, e.g.*, 84 Fed. Reg. at 16,577 (proposing to eliminate the removal element discussed above, *supra* 11), *with* 81 Fed. Reg. at 90,548 (explaining that this "information will provide data on the extent to which . . . ICWA [children] are removed in a manner that conforms to ICWA's standards" and will "help[] identify needs for training and technical assistance"). In most cases, Defendants did not even acknowledge their prior conclusions. Instead, they generally provided a generic and conclusory rationale that such data were "better suited for a qualitative review," 84 Fed. Reg. at 16,574, even though nearly all of the data elements they proposed to cut were yes/no options, dates of recorded events, or similarly quantitative and discrete facts, *see* 81 Fed. Reg. at 90,584-97; *see also* AR 2396-97. Defendants also summarily asserted that the ICWA data violated the Act's mandate that AFCARS not unnecessarily divert resources from agencies, *see* 84 Fed. Reg. at 16,574, but again refused to consider whether the benefit outweighed the burden, as would be needed to determine whether any purported "diversion" would be "necessary."

Defendants also significantly changed their methodology for estimating the hours needed for reporting and recordkeeping for each child in care. Because title IV–E agencies need to answer only 3 questions for children to whom ICWA does not apply, the 2016 Final Rule separately calculated burdens for ICWA- and non-ICWA children, estimating 10 hours per child for the former and 3 hours per child for the latter. *See* 81 Fed. Reg. at 90,568. By contrast, the 2019 NPRM's calculations lumped *all* children together, assuming agencies would spend the same number of hours on each case even though the vast majority of ICWA questions would be asked of just 2 percent of children. *See* 84 Fed. Reg. at 16,589. This unexplained methodological change increased the estimate for the 2016 Final Rule to 6 hours per child for *all* children, including the 98% of children for whom title IV–E agencies would only need to answer 3 questions. *Id.* This allowed the agency to assume a 33% across-the-board cost savings for all children, significantly inflating the apparent savings from gutting the 2016 Final Rule's requirements. *Id.* at 16,586.

B. 2020 Final Rule

In response to the 2019 NPRM, ACF received 150 comments. 85 Fed. Reg. at 28,411. As before, the majority (but not all) of the state title IV–E agencies supported eliminating data elements, while all 33 Indian tribes or tribal organizations and nearly all other organizational, private, and congressional commenters opposed the changes. *Id.*; Answer ¶ 177. The 2020 Final Rule, like the 2019 NPRM before it, made no mention of the tribal title IV–E agencies that opposed the elimination of the requirements. Nor did it respond to the state title IV–E agencies that supported the sexual orientation and ICWA data elements. *See* 85 Fed. Reg. at 28,411-12.

Despite the arguments made by the majority of comments, Defendants finalized their 2019 proposals without substantive changes on May 12, 2020. *See* 85 Fed. Reg. at 28,410-11. As most relevant to this case, they eliminated the two sexual orientation elements (for youth 14 and over and for foster parents, adoptive parents, and legal guardians) and the majority of ICWA-related data elements. *See id.* at 28,411-13. They also provided states with an additional two years to comply with the new requirements, even though they were allegedly *reducing* the burden from what states had been preparing for since 2016. *Id.* at 28,411. As a result, states will not need to comply with the new requirements until October 1, 2022. *Id.* at 28,413.

The sole purpose of the changes, according to the 2020 Final Rule's executive summary, was to comply with a 2017 executive order—which has since been revoked—that directed agencies to identify regulations that could be repealed or modified.[7] 85 Fed. Reg. at 28,410. ACF did not attempt to explain why the executive order supported its decision; it simply cited the order as a conclusory justification for its choice. *See id.* Although the only relevant factor in the executive order that could have plausibly supported the Rule required the agency to ask whether the regulation "impose[s] costs that exceed benefits," 82 Fed. Reg. at 12,286, Defendants again declined to analyze the benefits of the 2016 Rule, let alone explain why they were exceeded by the costs. *See* 85 Fed. Reg. at 28,410 (under "Costs and benefits," listing only the supposed cost

[7] Exec. Order No. 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Feb. 24, 2017); Exec. Order No. 13992, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7,049 (Jan. 20, 2021) (revoking Executive Order 13777).

savings of eliminating portions of the 2016 Final Rule); *see also* AR 2246-47 (explaining why Exec. Order 13777 did not justify the proposed changes). Likewise, in granting states an additional two years to comply with the remaining requirements, Defendants did not balance the delay against the lost years of national data. Nor did they consider implementing the data elements that had been undisputed since 2016 on a faster timetable.

As in the 2019 NPRM, Defendants downplayed the analyses provided by the overwhelming body of adverse commenters because they "were not agencies responsible for reporting data to AFCARS." 85 Fed. Reg. at 28,412. This was another unexplained departure from the approach Defendants took in the 1993 and 2016 rulemakings. *See, e.g.*, 58 Fed. Reg. at 67,912 (including "national advocacy organizations" among the groups interested in AFCARS data).

V. Plaintiffs and Procedural History

Plaintiffs in this case include California Tribal Families Coalition (a coalition of 38 tribes located in California), the Yurok Tribe, Cherokee Nation, Facing Foster Care in Alaska (a foster youth and foster care alumni organization), Ark of Freedom Alliance (an organization that works with LGBTQ+ youth who have experienced trafficking), the Ruth Ellis Center (an organization that works with LGBTQ+ youth in Michigan), and True Colors, Inc (an organization that works with LGBTQ+ youth in Connecticut). As part of their missions, these Plaintiffs work to improve outcomes in the child welfare setting for LGBTQ+ youth, AI/AN youth, or both.[8]

Plaintiffs filed suit on August 27, 2020, alleging that the 2020 Final Rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Compl. ¶ 249-50 (not admitted) (citing 5 U.S.C. § 706(2)(A)). Defendants served an answer and the administrative record on December 23, 2020. ECF Nos. 52, 53.

LEGAL STANDARD

Summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

[8] Ex. A, Decl. of Delia Sharpe ("CTFC Decl.") ¶¶ 4-12; Ex. B, Decl. of Joseph L. James ("Yurok Decl.") ¶¶ 3-7; Ex. C, Decl. of Lou Stretch ("Cherokee Decl.") ¶¶ 4-8; Ex. D, Decl. of Amanda Metivier ("FFCA Decl.") ¶¶ 3-13; Ex. E, Decl. of Gerald W. Peterson ("REC Decl.") ¶¶ 3-12.

Civ. P. 56(a). Where the questions are purely legal in nature, a court can resolve a challenge to a federal agency's action on a motion for summary judgment. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). "Generally, judicial review of agency action is limited to review of the record on which the administrative decision was based." *Zieroth v. Azar*, No. 20-cv-172, 2020 WL 5642614, at *1 (N.D. Cal. Sept. 22, 2020) (quoting *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). "A reviewing court can, however, 'go outside the administrative record . . . for the limited purpose of background information.'" *Id*.

ARGUMENT

I. Plaintiffs Have Standing to Pursue Their Claims

To demonstrate Article III standing a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

"[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). Here, Congress explicitly required the Secretary of HHS to

> [P]rovide comprehensive national information with respect to—(A) the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents, (B) the status of the foster care population, . . . [and] (D) the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided.

42 U.S.C. § 679(c)(3). It further required the Secretary to "disseminate [that] data and information" through the National Adoption Information Clearinghouse. *Id.* § 679a(4). Congress thus created a statutory entitlement to data on youth in foster and adoptive care, along with data on the assistance provided to them. Because Plaintiffs were denied that information with regard to the eliminated data elements, they have suffered a concrete injury-in-fact and "need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549.

Even if Plaintiffs needed to show injury caused by the denial of information, they have amply established that injury. An organization has standing to sue in its own right when "it show[s] a drain on its resources from both a diversion of its resources and frustration of its

mission." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (internal citations omitted); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Here, Plaintiffs have shown that their mission-driven activities—which aim to improve outcomes for youth in child welfare systems—have been impaired by the 2020 Final Rule, causing Plaintiffs to divert their resources to combat the effects of the Rule.[9]

First, the 2020 Final Rule's removal of sexual orientation and ICWA data impairs the ability of Facing Foster Care in Alaska ("FFCA"), the Ruth Ellis Center ("REC"), and the tribal plaintiffs to provide direct services. To begin, the removal of sexual orientation data harms the ability of FFCA and REC to provide direct services by impairing their ability to identify and comprehend the needs of the youth they serve. FFCA Decl. ¶ 34; REC Decl. ¶ 22. Similarly, such data would help these organizations to assess and improve their services. *Id*. In the absence of such data, these organizations' services are less effective and more time consuming, diverting resources away from other activities.

Likewise, the 2020 Final Rule makes it more difficult for the Cherokee Nation and the Yurok Tribe (collectively "Tribes") to care for their children by removing data that is critical to helping tribes identify their children, Cherokee Decl. ¶¶ 15-16, 21; Yurok ¶¶ 11, 16, and by increasing the likelihood of ICWA implementation errors. Cherokee Decl. ¶¶ 18-19, 22; Yurok Decl. ¶¶ 9-10. For example, improper implementation of ICWA's inquiry and notice requirements—which is made more likely by the 2020 Final Rule—prevents the Tribes from identifying individual children and from tracking the total number of children in state care. Cherokee Decl. ¶¶ 10-13; Yurok Decl. ¶¶ 10, 12. This in turn impedes their ability to effectively provide services to their children. Cherokee Decl. ¶¶ 10-11, 13, 16, 20-22; Yurok Decl. ¶¶ 11–17. As a result, the Tribes' children often suffer worse outcomes, harming the Tribes' sovereign

[9] In addition to suing in its own right, California Tribal Families Coalition ("CTFC") has standing to sue on behalf of its member tribes because its members—including Plaintiff Yurok—"would otherwise have standing to sue in their own right, the interests at stake are germane to [CTFC's] purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015). *See also* CTFC Decl. ¶¶ 18-22 (detailing harms to member tribes).

interests in protecting the well-being of their people. *Id.* The Tribes are also forced to expend greater resources to provide their child welfare services, causing the Tribes to provide fewer, less effective services and diverting resources away the Tribes' other activities. Cherokee Decl. ¶¶ 8, 10, 13-14, 19, 22; Yurok Decl. ¶ 18.

Second, by removing ICWA data, the rule prevents CTFC, Cherokee Nation, and Yurok from identifying recurring implementation issues and working with title IV-E agencies to fix them. CTFC Decl. ¶¶ 16, 19-20; Yurok Decl. ¶¶ 9-10; Cherokee Decl. ¶¶ 10-12, 18-19. This in turn makes errors more likely, which will result in worse outcomes for the Tribes' children, harming their sovereign interests. Yurok Decl. ¶¶ 12-15; Cherokee Decl. ¶¶ 10-11.

Third, the 2020 Final Rule impedes the ability of CTFC, Yurok, FFCA and REC to obtain funding, which often depends on the type of data that the 2020 Final Rule removed. CTFC Decl. ¶ 17; Yurok Decl. ¶ 19; FFCA Decl. ¶¶ 36-37; REC Decl. ¶¶ 23-24.

Fourth, the 2020 Final Rule undermines FFCA's ability to provide trainings to professionals who work with LGBTQ+ and AI/AN youth in child welfare settings. FFCA Decl. ¶ 35. If FFCA and AFA had access to such data, their trainings could more effectively communicate the significance of the challenges faced by such youth and provide more targeted recommendations for supporting those youth. *Id.*

Fifth, the 2020 Final Rule harms the ability of three of the Plaintiffs—CTFC, FFCA, and REC—to design and advocate for policies that will improve outcomes for LGBTQ+ youth and AI/AN children in the child welfare system. CTFC Decl. ¶¶ 8, 10, 14-15; FFCA Decl. ¶¶ 24-32; REC Decl. ¶¶ 16-22. Specifically, the rule removes data that would improve the quality of these organizations' policy solutions and provide persuasive evidence of the need for reform. CTFC Decl. ¶¶ 14-15; FFCA Decl.¶¶ 24-32; REC Decl. ¶¶ 16-22. Consequently, their advocacy efforts are less effective and more time consuming, diverting resources away from other activities. *Id.*[10]

[10] While Plaintiffs' counsel believe that True Colors, Inc. and Ark of Freedom Alliance ("AFA") had standing at the time of the Complaint, this motion does not rely on either to establish standing. As a result of the pandemic's impact on their operations and staffing issues, True Colors and AFA were unable to provide a declaration at this time. Counsel will provide the Court with further updates as necessary. If the Court finds that any other Plaintiff has standing, it need not determine

II. The 2020 Final Rule Is Not in Accordance with Law

As explained above, Defendants are statutorily required to collect

> [C]omprehensive national information with respect to—(A) the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents, (B) the status of the foster care population, . . . [and] (D) the extent and nature of assistance provided by Federal, State, and local adoption and foster care programs and the characteristics of the children with respect to whom such assistance is provided.

42 U.S.C. § 679(c)(3). By refusing to collect demographic data regarding sexual orientation, the Rule is "not in accordance with law" and must be set aside. 5 U.S.C. § 706(2)(A).

Although the Social Security Act does not define the term "demographic characteristics," the word "demographics" means "characteristics of human populations and population segments, especially when used to identify consumer markets." *Demographics*, American Heritage Dictionary (3d ed. 1994); *cf. Keithley v. Homestore.com, Inc.*, No. 03-cv-4447, 2007 WL 2701337, at *11 (N.D. Cal. Sept. 12, 2007) (identifying this definition as the "ordinary meaning" of "demographics"). Sexual orientation is unquestionably a "characteristic[] of human populations." For example, in a white paper that, as discussed further below, *see infra* 24-25, Defendants purported to rely on in the Rule, an OMB working group recognized "sexual identity questions" as a type of "demographic question[]." AR 180. As numerous studies and surveys included or discussed in the administrative record reflect, sexual orientation is similarly recognized as a demographic matter in academic literature. *See, e.g.*, AR 494, 505, 2937. By eliminating demographic questions regarding sexual orientation from AFCARS, Defendants thus acted contrary to the statute. In any event, as discussed *infra* Part III (B), even if Defendants' obligation to collect demographic characteristics does not *require* collection of data on sexual orientation, their failure *even* to consider whether sexual orientation is an important demographic characteristic constitutes a failure to consider an important aspect of the problem, making the Rule arbitrary and capricious.

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whether True Colors or AFA also would. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

III. The 2020 Final Rule Is Arbitrary and Capricious

Under the APA, "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, or if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency reverses its prior position, it must "display awareness that it is changing position," "show that there are good reasons for the new policy," and provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). An agency must also "consider and respond to significant comments," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015), and "consider the alternatives that are within the ambit of the existing policy," *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (alterations adopted and internal quotation omitted).

A. The 2020 Final Rule Is Arbitrary and Capricious as a Whole

The 2020 Final Rule is arbitrary and capricious because its rationale is grounded in a cost-benefit analysis that failed to consider the benefits, contradicted the evidence before the agency, disregarded facts and circumstances that underlay the prior policy, and refused to respond meaningfully to significant comments. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

First, Defendants' explanation for the Rule is grounded in a cost-benefit analysis that "fail[ed] to include . . . the benefit of [the removed data elements] in either quantitative or qualitative form." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008). The Rule's sole justification for removing nearly 100 data elements was to comply with Executive Order 13777, *see* 85 Fed. Reg. at 28,410, which required agencies

to identify and reevaluate regulations that "impose costs that exceed benefits," E.O. 13777 § 3(d)(iii). Accordingly, Defendants identified the 2016 Final Rule as "one in which the reporting burden may impose costs that exceed benefits." 85 Fed. Reg. at 28,410.

Despite making this cost-benefit analysis the centerpiece of its justification, the 2020 Final Rule declines to analyze the benefits of the 2016 Final Rule at all. The Executive Summary notes the estimated cost savings that would result from "reduc[ing] the title IV-E agency reporting burden from the 2016 Final Rule," but omits any discussion of benefits to children and families—ACF's core constituents. *Id.* Likewise, the full cost-benefit analysis discusses only the "[e]stimated burden and costs . . . of the overall information collection" when supporting its conclusion that the 2020 Final Rule "will avoid [an] unnecessary diversion of resources." *Id.* at 28,419. Conspicuously absent is *any* mention of the benefits that would result from gathering the removed data elements, much less an explanation of why the costs exceed those benefits. *Id.*[11] Nor does the Rule consider the benefits when discussing individual removed data elements. *See, e.g.*, *id.* at 28,413 (sexual orientation data elements); *id.* at 28,412-13 (ICWA data elements).

This failure is arbitrary and capricious because an agency "cannot put a thumb on the scale by undervaluing the benefits" of an action that conflicts with its preferred policy. *Ctr. for Biological Diversity*, 538 F.3d at 1198; *see State v. U.S. Bureau of Land Mgmt.*, 277 F.Supp.3d 1106, 1122 (N.D. Cal. 2017) ("Merely to look at only one side of the scales, whether solely the costs or solely the benefits . . . fail[s] to take [an] 'important aspect' of the problem into account and [is] therefore arbitrary.").

Second, Defendants' refusal to consider the benefits of the eliminated data elements "disregard[ed] facts and circumstances that underlay" the prior agency rule without a "reasoned explanation." *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television Stations*, 556 U.S. at 516). The 2016 Final Rule robustly analyzed the benefits of the individual data elements

[11] While the 2020 Final Rule refers to Defendants' reasoning in the 2019 NPRM, that document's "Costs and Benefits" section similarly focused solely on the costs associated with reporting information, rather than the benefits derived from that data. *See* 84 Fed. Reg. at 16,572 (summarizing the "costs and benefits" without any mention of benefits); *id.* at 16,586 (discussing only costs); *id.* at 16,587-90 (providing a "burden estimate" of the costs).

throughout the rulemaking. *See, e.g.*, 81 Fed. Reg. at 90,527-28. Against that background, the 2016 cost-benefit analysis concluded that the 2016 Final Rule "maximize[s] net benefits" and "balances the need for more current data with concerns from commenters about the burden that new reporting requirements represent." *Id.* at 90,565-56.

In coming to the opposite conclusion in the 2020 Final Rule's cost-benefit analysis, Defendants do not acknowledge their prior position, let alone provide reasons for departing from it. 85 Fed. Reg. at 28,419. And in failing to consider any benefits whatsoever, Defendants ignored the many benefits of individual elements discussed by the 2016 Final Rule. *Compare, e.g.,* 2020 Final Rule, 85 Fed. Reg. at 28,413 (failing to discuss benefits of sexual orientation elements), *with* 2016 Final Rule, 81 Fed. Reg. at 90,534 (noting that the sexual orientation data will help "ensure that . . . services are designed appropriately to meet [the] needs [of LGBTQ youth]").[12]

Third, the cost-benefit analysis relied on a "burden estimate" that contradicted the evidence in the record. As explained above, the 2019 NPRM's calculations—which were adopted by the 2020 Final Rule—were predicated on the understanding that the 2016 Final Rule would require title IV–E agencies to ask every ICWA question for all children. *See* 84 Fed. Reg. at 16,589 (assuming agencies would spend the same amount of time collecting data in each case); 85 Fed. Reg. at 28,420 (adopting those calculations). But this is inconsistent with the 2016 Final Rule's requirements, which directed agencies to collect the vast majority of ICWA data elements in only 2 percent of cases. *Supra* 10-11. By ignoring the evidence in the record, Defendants impermissibly "overvalu[ed] the costs" of collecting ICWA data. *Ctr. for Biological Diversity*, 538 F.3d at 1198.

Fourth, Defendants failed to respond meaningfully to significant comments, both about the burden of the rule and the benefits of the data elements that Defendants cut. For example, numerous commenters explained why Defendants' cost estimates were overstated. Among other things, comments on the 2018 ANPRM and 2019 NPRM explained that: much of the burden of updating states' systems would exist regardless of the ICWA data elements, *e.g.*, AR 988; that

[12] Likewise, the 2020 Final Rule's methodology for calculating the burden associated with collecting ICWA data represents an unacknowledged departure from that used by the 2016 Final Rule. *See supra* 13-14.

many states had already begun updating their systems and incurring such costs, *e.g.*, *id.*; AR 761; and that title IV–E agencies would need to answer only three ICWA-related data elements for 98 percent of cases, *see, e.g.,* AR 2781, 2898. None of these concerns are addressed in the 2020 Final Rule. In fact, the 2019 NPRM explicitly mispresented such comments on the 2018 ANPRM, claiming that non-state commenters "did not provide specific comments on . . . cost or burden[.]" 84 Fed. Reg. at 16,574. Because Defendants failed to "consider and respond to significant comments" that cast doubt on the primary justification for the Rule, the 2020 Final Rule was unlawful. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 775 (9th Cir. 2018) (quoting *Perez,*575 U.S. at 96).

B. The Elimination of the Sexual Orientation Elements Was Arbitrary and Capricious

In removing the data elements regarding the sexual orientation of youth age 14 and older and of foster parents, adoptive parents, and legal guardians, Defendants acted arbitrarily.

First, Defendants failed to consider Congress's explicit command that they collect data regarding the "demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents." 42 U.S.C. § 679(c)(3)(A). As explained above, sexual orientation is a key piece of demographic information that HHS is obligated to collect. *See supra* 20. But even if sexual orientation were merely optional under the Act, the APA required Defendants to consider whether eliminating those data elements detracted from the goals of the statutory scheme. *See Hoag Memorial Hosp. Presbyterian v. Price*, 866 F.3d 1072, 1079 (9th Cir. 2017) (holding that an agency has a "duty to do *something* to ensure compliance with the applicable substantive requirement"). Neither the 2020 Final Rule, the 2018 ANPRM, nor the 2019 NPRM made *any* attempt to determine whether eliminating the sexual orientation questions impaired Defendants' ability to collect information on demographic characteristics. Therefore, Defendants "entirely failed to consider an important aspect of the problem," and the 2020 Final Rule was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Second, Defendants' explanation was contrary to the evidence before them. They justified eliminating the sexual orientation elements on the premise that such questions did not comply with a 2016 white paper published by the OMB Federal Interagency Working Group on Improving

Measurement of Sexual Orientation and Gender Identity in Federal Surveys (the "OMB White Paper"). *See* 85 Fed. Reg. at 28,413; 84 Fed. Reg. at 16,576-77. According to Defendants, the OMB White Paper "advises that new questions added to a survey or data base should be validated with qualitative techniques and [that] question validation efforts should include both the SOGI [*i.e.*, sexual orientation and gender identity] and non-SOGI groups." 84 Fed. Reg. at 16,576. Because of "the need to validate questions related to sexual orientation and [to] ensure [that] responses . . . are . . . confidential," Defendants concluded "that AFCARS is not the appropriate vehicle to collect this information." *Id.*

This reasoning misstated the OMB White Paper. The working group did not recommend that validation testing be employed for any "new questions added to a survey or data base." *Id.* Rather, it recommended validation only when an agency chooses to develop a question not previously used on other surveys or used in "a new setting with a different audience."[13] The questions ACF incorporated in the 2016 Final Rule were taken directly from the Centers for Disease Control and Prevention's Youth Risk Behavior Surveillance System ("YRBSS"), a program that surveys many of the same youth. The OMB White Paper explicitly recognized the YRBSS questions as one of the "current measures of sexual identity . . . in Federal surveys/studies."[14] Indeed, the 2016 Final Rule had rejected suggestions to broaden the questions beyond the YRBSS model, hewing to the precise questions approved by the OMB White Paper. *See* 81 Fed. Reg. at 90,534. To suggest that the OMB White Paper—which endorsed the very questions used in the 2016 Final Rule in an indistinguishable setting—undermined the 2016 Final Rule was thus "counter to the evidence before the agency, or . . . so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

Defendants' purported concern that the questions seeking *voluntary* responses "may be perceived as intrusive" and could not be asked in a sensitive, confidential manner, 84 Fed. Reg. at

[13] Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, *Current Measures of Sexual Orientation and Gender Identity in Federal Surveys* 17 (2016), https://nces.ed.gov/FCSM/pdf/buda5.pdf ("OMB White Paper").

[14] *Id.* at 5, 9.

16,576, is similarly refuted by the evidence before them. Numerous commenters cited to professional guidelines for collecting sexual orientation information from youth in child welfare systems, which mitigate any sensitivity and confidentiality concern. *See, e.g.*, AR 2340-41. The 2020 Final Rule dismissed those guidelines, asserting that they "are not relevant to . . . *Federal* administrative data collection" because they provide guidelines "for child welfare staff and child welfare agencies on how they . . . gather and manage SOGI information at the *case, local, and state* level." 85 Fed. Reg. at 28,413 (emphasis added). This reasoning was irrational, because—by Defendants' own admission—"casework[er]s are . . . responsible for gathering most of the information that is to be reported to AFCARS." AR 301. The answers to the sexual orientation questions, like most other AFCARS data, are therefore collected by "child welfare staff and child welfare agencies . . . [who] gather and manage SOGI information at the case . . . level"—the very subject of the guidelines Defendants found irrelevant. 85 Fed. Reg. at 28,413. The guidelines were thus directly on point, and the 2020 Final Rule's basis for dismissing them was nonsensical.

Moreover, case workers already collect sensitive information that is reported to AFCARS such as abuse history, reproductive health decisions, trafficking, and mental health diagnoses and medications. ACF made no effort to explain why voluntarily disclosed sexual orientation could not be recorded and safeguarded in a consistent manner. Furthermore, if Defendants' rationale held water at all, it would only be as to the question asking about the sexual orientation of youth age 14 and older. Defendants did not even attempt to explain why their purported concerns justified deleting the question about the sexual orientation of the adults who serve as foster parents, adoptive parents, and legal guardians.

Third, Defendants disregarded facts and circumstances that underlay their prior policy. When issuing the 2016 Final Rule, ACF had considered the exact concerns on which Defendants purported to rely in 2020. It explicitly noted that both youth and parents could decline to answer the questions, and that all child welfare databases are subject to confidentiality requirements. *See* 81 Fed. Reg. at 90,535. The 2016 Final Rule even cited the exact type of guidelines that the 2020 Final Rule dismissed as irrelevant. *See* 81 Fed. Reg. at 90,526. Contrary to the Supreme Court's explicit guidance, the 2020 Final Rule did not even "display awareness that [Defendants were]

changing position," *Fox Television Stations*, 556 U.S. at 515, much less provide a "reasoned explanation" for "disregarding facts and circumstances that underlay . . . the prior policy," *id.* at 515-16. This "unexplained inconsistency" requires that the 2020 Final Rule be found arbitrary and capricious. *See Encino Motorcars*, 136 S. Ct. at 2126.

Fourth, Defendants failed to respond meaningfully to significant comments opposing the elimination of the sexual orientation questions. Commenters explained that abandoning the questions would make it more difficult to address the overrepresentation of LGBTQ+ youth in care and the litany of poor outcomes for those youth. *E.g.*, AR 2650; AR 2853-55 (exclusion of data "would negatively impact the safety, permanency, and well-being of LGBTQ children"). Defendants acknowledged these and several other objections in a single sentence, 85 Fed. Reg. at 28,413, and made no attempt to refute them; instead, they ignored them. That is unlawful. The APA requires that agencies do more than merely "[n]od[] to concerns raised by commenters only to dismiss them in a conclusory manner." *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020); *California ex rel. Becerra v. DOI*, 381 F. Supp. 3d 1153, 1169 (N.D. Cal. 2019) (responding to significant comments with a "conclusory statement—unsupported by facts, reasoning or analysis—is legally insufficient"). Here, the Defendants barely even acknowledged the adverse comments, much less provided a rational explanation rebutting them.

C. The Elimination of the ICWA Elements Was Arbitrary and Capricious

Defendants' elimination of ICWA data elements was likewise arbitrary and capricious.

First, the 2020 Final Rule's primary explanation for eliminating or sharply narrowing 18 of 24 ICWA data elements was wholly unreasoned. The 2020 Final Rule asserts that "[r]etaining all of the 2016 final rule ICWA-related data elements would put HHS in the position of interpreting various ICWA requirements" and "determin[ing] state compliance with ICWA." 85 Fed. Reg. at 28,412. In Defendants' view, legal authority to conduct such activities belongs squarely to the Department of Interior ("DOI"), not HHS. *Id.* This is a mischaracterization of the 2016 Final Rule that cannot "be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Far from "interpreting" ICWA, the 2016 Final Rule intentionally deferred to DOI's interpretation by making the data elements "consisten[t] with

DOI's final rule on ICWA." 85 Fed. Reg. at 28,412. Indeed, DOI specifically urged HHS to "keep the vast majority of the ICWA-related data elements in the 2016 final rule." AR 7.

Nor did the 2016 Final Rule's collection of ICWA data require HHS to "determine compliance" or "penalize states for failure to comply with ICWA," as Defendants assert. 85 Fed. Reg. at 28,412. The 2016 Final Rule imposed penalties only for failure to submit data in compliance with the AFCARS requirements—not for anything the data might show about ICWA compliance. *See* 81 Fed. Reg. at 90,524-25. Moreover, if Defendants were correct that HHS lacked "legal authority . . . to collect ICWA-related data in AFCARS," 85 Fed. Reg. at 28,412, the 2020 Final Rule would itself exceed HHS's authority as it retains data elements tracking ICWA requirements, *e.g.*, *id.* at 28,414 (asking whether the title IV–E agency provided notice to tribes as required by ICWA Section 1912(a)). Such "internally inconsistent analysis is arbitrary and capricious." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015).

Likewise, the assertion that the removed ICWA data elements "would not be available for ICWA compliance purposes"—because ACF "will not release specific information regarding a child's tribal membership or ICWA applicability," 85 Fed. Reg. at 28,413—again misunderstands the purpose of collecting ICWA data. The 2016 Final Rule makes clear that such data is intended for use in the aggregate to inform policy-driven activities (such as targeting guidance and assistance to states), not to assess or enforce ICWA compliance in a specific case. *Supra* 10. Nor are Defendants saved by the 2019 NPRM's explanation that ICWA data is "better suited for a qualitative review." 84 Fed. Reg. at 16,574. As noted above, nearly all of the removed data elements were yes/no options, dates of recorded events, or similarly quantitative and discrete facts. *See* 81 Fed. Reg. at 90,584-97 (listing the ICWA data elements adopted by the 2016 Final Rule); *see also* AR 2396-97. This is hardly the "rational connection between the facts found and the choice made" that is required to provide a "satisfactory explanation." *State Farm*, 463 U.S. at 43.

Second, Defendants' other ICWA-related rationales disregarded the facts and circumstances that underlay their prior policy without explanation. Specifically, Defendants assert that "[r]equiring every state . . . to report on a large number of [ICWA] data elements" would not "meet [the] mandate" in Section 479(c)(1) of the Social Security Act to "avoid unnecessary

diversion of resources from agencies." 84 Fed. Reg. 16,575. But the 2016 Final Rule "carefully considered [that] statutory requirement . . . and determined that the [2016] Final Rule does not represent an unnecessary diversion of resources." 81 Fed. Reg. at 90,566. This determination was supported by numerous findings as to the benefits of ICWA data, *supra* 10, and a burden estimate that took into account the fact that states would be required to answer the majority of ICWA data elements in only 2 percent of cases. *Id.* at 90,568. Defendants completely ignored their prior determination as to Section 479(c)(1), as well as the underlying discussion of the benefits and limited burden of collecting the ICWA data elements. *See supra* 21-22. Indeed, neither the 2019 NPRM nor the 2020 Final Rule "display[ed] awareness that [ACF was] changing position" on Section 479(c)(1), much less provided a "reasoned explanation . . . for disregarding the facts and circumstances that underlay . . . the prior policy." *Encino Motorcars*, 136 S. Ct. at 2126.

Defendants similarly failed to acknowledge the 2016 Final Rule's detailed explanations regarding why each of the deleted ICWA data elements was essential. For example, with respect to the decision to eliminate the ICWA "removal" data element—which required title IV–E agencies to report whether a court made certain statutorily mandated findings before removing an ICWA child from their parents' home—Defendants provided no discussion beyond their desire to streamline ICWA data elements generally. *See* 84 Fed. Reg. at 16,577 (noting only that Defendants proposed deleting that element); 85 Fed. Reg. at 28,411 (adopting the 2019 NPRM's proposals without further discussion of the eliminated elements). This utter lack of explanation completely ignores ACF's earlier findings on that element. Among other things, the 2016 Final Rule found that "the removal data elements will provide data on the extent to which . . . ICWA [children] are removed in a manner that conforms to ICWA's standards" and will help "identify needs for training and technical assistance[.]" 81 Fed. Reg. at 90,548. ACF also explained that the removal standards "prevent the continued breakup of Indian families[.]" 81 Fed. Reg. at 20,289.

Defendants likewise failed to acknowledge or account for their departure from earlier findings on every other element that they removed or streamlined. *See* Ex. F (comparing the 2016 Final Rule's findings with the 2019 NPRM and 2020 Final Rule's discussion of each removed element). Because Defendants failed "to address the apparent inconsistencies between [the] earlier

rule and the rule at issue here," the 2020 Final Rule is arbitrary and capricious. *Gomez-Sanchez v. Sessions*, 892 F.3d 985, 995 (9th Cir. 2018) (citing *Encino Motorcars*, 136 S. Ct. at 2126).

Third, Defendants did not respond meaningfully to significant comments opposing the removal of the ICWA data elements. These commenters—which included 3 states, all 33 Indian tribes or tribal organizations, and the vast majority of other organizational, private, and congressional commenters—explained at length the value of collecting such data. *See, e.g.,* AR 2896-98, 2400-06 (explaining how specific data elements will improve ICWA implementation and outcomes for AI/AN children). Commenters also raised serious doubts about the 2019 NPRM's rationale for removing ICWA data elements. For example, in response to ACF's suggestion that removed data elements could be collected through "alternative methods" such as the Court Improvement Program, California noted that this outcome seemed unlikely as such methods would require states to voluntarily prioritize ICWA data collection. AR 2649-50; *see also, e.g.*, AR 2399. Another commenter cautioned that the "generalized justification that ICWA data elements are better suited to qualitative assessments does not stand to reason" because "the ICWA data elements which were added in 2016 were answerable in 'yes' or 'no' format." AR 2396-97; *see also, e.g.*, AR 2782 (arguing that removed data elements are quantitative).

These comments strike at the heart of Defendants' justification for removing ICWA data elements. Yet the 2020 Final Rule fails to "consider and respond to [these] significant comments," 85 Fed. Reg. at 28,412-13 (responding to ICWA-related comments), as required by the APA, *East Bay*, 932 F.3d at 775. In fact, Defendants failed to acknowledge most of them. *See* 85 Fed. Reg. at 28,412 (summary of ICWA comments). Defendants even went so far as to claim that they "did not receive comments specific to [the] data element" regarding ICWA inquiries, 85 Fed. Reg. at 28,414, even though they received comments urging ACF to retain the full element, *see, e.g.*, AR 2404-05. The 2020 Final Rule is thus "legally insufficient" and must be set aside. *California ex rel. Becerra*, 381 F. Supp. 3d at 1169.

CONCLUSION

For the foregoing reasons, the 2020 Final Rule was contrary to law and arbitrary and capricious, and must be set aside.

Dated: May 17, 2021

Respectfully submitted,

By: */s/ Kristen P. Miller*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION, YUROK TRIBE, CHEROKEE NATION, FACING FOSTER CARE IN ALASKA, ARK OF FREEDOM ALLIANCE, RUTH ELLIS CENTER, and TRUE COLORS, INC.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, JOOYEUN CHANG, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, and ADMINISTRATION FOR CHILDREN AND FAMILIES,

Defendants.

Case No. 20-cv-6018 (MMC)

DECLARATION OF DELIA SHARPE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Delia Sharpe, hereby state as follows:

1. The information set forth in this affidavit is based on my personal knowledge.

2. I am the founding Executive Director of California Tribal Families Coalition ("CTFC") and have been since June, 2017.

3. In that role I supervise five staff. My responsibilities include interfacing with the Member Tribes, working with the Board to establish and report back on organizational priorities, guiding the organization's legislative and policy work, overseeing direct services provided to member tribes on various areas of child welfare, advancing advocacy for the members tribes, and ensuring that the child welfare policy and legal interests of the tribal community are protected.

4. CTFC is a 501(c)(4) non-profit tribal organization comprised of 38 federally recognized member tribes, including Plaintiff Yurok Tribe, and three Tribal Leaders' Associations. Its principal place of business is 305 Freeport Blvd. Ste. 154, Sacramento, California 95818.

5. CTFC is guided and governed by its member tribes, which join the organization through tribal government resolution. The CTFC's Board of Directors is comprised of elected leaders of the member tribes. The Board of Directors sets the priorities of CTFC and regularly provides guidance regarding how CTFC carries out its mission and work, especially in considering organizational priorities, shaping organizational responses to changes in state or federal policy, and understanding the community effects of policy, regulatory and legal developments.

6. CTFC's broad mission is to promote and protect the health, safety, and welfare of tribal children and families, which are inherent tribal governmental functions and at the core of tribal sovereignty and governance. CTFC was formed to carry out the recommendations of California's Indian Child Welfare Act ("ICWA") Compliance Task Force. The Task Force was an independent and tribal-led group comprised of tribal leaders, representatives, and advocates that was formed to identify ways to improve the implementation of ICWA and California's corresponding state

legislation for the benefit of tribes, Indian families, and their children. The Task Force's efforts culminated in a 2017 Final Report that issued a series of recommendations for improving ICWA implementation, including improvements to ICWA data collection.[1]

7. To correct pervasive ICWA implementation issues, CTFC engages in a variety of activities guided by the Task Force Report. These activities include efforts to directly improve ICWA implementation and to expand ICWA-related data collection, which will further facilitate improved implementation.

8. To improve ICWA implementation directly, CTFC provides free ICWA training to child welfare agencies and social workers in the child welfare system. CTFC also advocates for policy changes that will result in improved ICWA competency. For example, CTFC regularly engages with the California Department of Social Services ("CDSS") to improve the agency's ICWA implementation, including enhanced oversight of the county-level subdivisions that are responsible for complying with ICWA's requirements. Similarly, CTFC has advocated to revise court rules that would mandate ICWA competency among attorneys, party representatives, and social workers.

9. CTFC also works to improve ICWA implementation by addressing various challenges that tribes face when seeking to intervene in state court cases involving tribal children. For instance, CTFC has worked to secure the right of tribes to participate in courtroom proceedings, improve tribal access to case records, and ensure that tribes obtain legal counsel. As part of the latter effort, CTFC is currently engaging in fundraising and strategic planning to provide tribes with legal counsel in ICWA cases in state court. As explained further below, and as the Task Force Report recognized, each of these efforts is seriously hindered by a lack of ICWA data.

[1] California ICWA Compliance Task Force, *Report to the California Attorney General's Bureau of Children's Justice* (2017) ("Task Force Report"), https://theacademy.sdsu.edu/wp-content/uploads/2015/06/icwa-compliance-task-force-final-report-2017.pdf.

10. Data on children protected by ICWA, their experiences in care, and agencies' efforts to implement ICWA are critical for all these activities. Unfortunately, comprehensive data is currently unavailable. For example, CTFC regularly works with the California Child Welfare Indicators Project ("CCWIP") database, which is operated under contract with CDSS. The CCWIP database, which is separate from AFCARS data, makes CMS/CWS data on children in care in California accessible for policy development and research. The CWWIP does attempt to identify American Indian children by race and track ICWA applicability. However, this data is almost certainly inaccurate. Based on CTFC's own data collection and work in the field, together with its knowledge of member Tribes' caseload, CTFC has observed that the CCWIP significantly undercounts dependent children eligible for ICWA. In fact, CTFC believes that only one-quarter of eligible cases are represented in the database. Similarly, CTFC's efforts to gather its own data from ICWA court cases is limited to cases that reach the appellate level; trial level data is currently unavailable because it is not included in any legal database the way appellate decisions are.

11. Because of the critical importance of data to these activities and the lack of adequate data at present, CTFC has also engaged in various efforts at the federal and state levels to improve ICWA data collection. At the federal level, CTFC submitted comments in 2015 to support and provide recommendations for the data collection requirements that were finalized in 2016. CTFC also submitted comments in 2018 and 2019 opposing ACF's proposal to remove ICWA data elements from AFCARS. *See* AR 1049; AR 2014; AR 2472.

12. Once it became clear that ACF intended to gut ICWA data elements from the AFCARS reporting requirements, CTFC began working with California's Department of Social Services to develop and implement state-level data collection requirements. This required a significant redirection of CTFC's resources that would have been unnecessary had the 2016 Final Rule remained in force. This redirection of CTFC's limited resources meant that other priorities of the

organization could not be advanced or had to be cut back, such as the 2021 state legislative priorities. Further, CTFC redirected limited resources to hire an additional staff member to have enough capacity to fully respond to the removal of the AFCARS data elements and still be able to address Tribally-directed priorities, like responding to the emerging Covid-19 crisis.

13. This lack of comprehensive and national ICWA data would have been addressed in part by the 2016 Final Rule, which required state title IV-E agencies to report ICWA data to AFCARS. By removing those data elements, the 2020 Final Rule directly harms CTFC by impeding its ability to carry out its mission to protect the health, safety, and welfare of tribal children, implement the recommendations of California's ICWA Compliance Task Force, train child welfare workers, and obtain funding for its activities.

14. First, the lack of data impedes CTFC's ability to effectively allocate resources and to design and advocate for legislation, regulations, and policies that target flaws in ICWA implementation. If armed with such data, CTFC would have a detailed, evidentiary record of the problems faced by child welfare agencies and state courts when implementing ICWA. This would in turn enable CTFC to craft appropriate policy solutions. As a direct result of the 2020 Final Rule, CTFC must instead pursue more expensive and less effective reforms.

15. By removing the data elements on ICWA implementation, the 2020 Final Rule deprives CTFC of persuasive, empirical evidence that it would use in its efforts to advocate for reforms. In the absence of such data, CTFC has historically encountered resistance from stakeholders who are reluctant to act without empirical evidence of the need for reform. For example, when CTFC sought legislation to fund diversion programs for high-risk AI/AN youth, the California Department of Finance—which analyzes legislative fiscal impacts—requested data on the population that would be served. Because CTFC was unable to provide the data, the legislation that was ultimately enacted provided a one-time funding allocation, rather than ongoing funding. The 2020 Final Rule's removal

of the ICWA data elements thus renders CTFC's advocacy efforts less effective and more time-consuming than they otherwise would be. This will divert resources away from CTFC's other activities, such as their work to ensure that tribes have access to legal counsel and the right to participate in courtroom proceedings concerning tribes, Indian families, and their children.

16. Second, the removal of ICWA data impedes CTFC's ability to improve ICWA competency by training individuals that work in the child welfare system. If CTFC had access to the ICWA data removed by the Rule, which tracks how state child welfare agencies and state courts are implementing ICWA's requirements, CTFC would be able to identify the most frequent and prevalent flaws in ICWA implementation. This would in turn allow CTFC to focus its finite training resources where they are most needed. The absence of such data therefore renders CTFC's training services less effective and more time-consuming than they otherwise would be, diverting resources away from CTFC's other activities.

17. Third, the 2020 Final Rule harms CTFC by impairing its ability to obtain funding. Without the data provided by the 2020 Final Rule, CTFC cannot provide data to support its own budgetary needs or support member tribe needs when negotiating allocations from state, federal or philanthropic sources. For example, CTFC is currently fundraising to support its efforts to provide tribes with legal counsel in ICWA cases in state court. These efforts have been seriously hindered by a lack of county-level ICWA data. For example, when CTFC requests financial support from elected tribal leaders, they often, rightfully, want to see data that can illuminate the needs of their specific tribal members in the counties contiguous to their tribal lands. Without accurate data CTFC is unable to illustrate for tribal leaders the local conditions of tribal citizens and ICWA non-compliance which would motivate those leaders to donate funds to CTFC.

18. In addition to impairing CTFC's activities, the 2020 Final Rule harms CTFC's member tribes by impairing their ability to protect and provide services to their children and vindicate their

rights under ICWA. CTFC tribes provide child welfare services to citizens of their tribes, work with state child welfare agencies to ensure appropriate treatment and services, and participate in state court proceedings for tribal citizens. The absence of AFCARS data makes these efforts more expensive and less effective in several ways.

19. First, CTFC's member tribes—including Plaintiff Yurok Tribe—will be less able to work with state child welfare agencies to improve their implementation of ICWA's protections. For instance, state child welfare agencies have historically struggled to identify Indian children and to provide timely notice of such cases to the child's tribe. Indeed, over the past 3 years, 92 percent of appeals of termination of parental rights cases involving ICWA were about inquiry and notice. And 57 percent of those appeals were remanded for failure to comply with ICWA's inquiry and notice requirements. This is consistent with the experience of CTFC's member tribes, who often receive notice of a case at the *end* of the adjudication, rather than the beginning.

20. This suggests that the agencies may be struggling to implement ICWA's requirement that agencies make inquiries with a child's biological and adoptive parents, guardians, and extended family to determine whether a child is protected by ICWA. Alternatively, they may be struggling with the requirement to provide timely notice to the child's parents and tribe(s) before initiating proceedings to terminate parental rights or put the child in foster care. By removing ICWA data from AFCARS, the 2020 Final Rule makes it more difficult for CTFC's member tribes to understand which aspect of the requirements state child welfare agencies are struggling with. This in turn makes it more difficult for tribes to work with state child welfare agencies to improve their identification and inquiry efforts. *See* Ex. B ¶¶ 10-11 (describing how the lack of ICWA data impairs Plaintiff Yurok Tribe's ability to improve ICWA identification and inquiry).

21. Second, by making it more difficult to improve ICWA implementation, the 2020 Final Rule also impairs CTFC tribes from providing timely and relevant services to their children and

from fully participating in state court proceedings that involve their children. For example, ICWA's notice requirement is critical to keeping Indian children in their community because it allows tribes to intervene at an early stage with services that can help prevent unwarranted removals, reunite removed children with their families, and otherwise achieve permanent placements for children. When state agencies fail to make sufficient inquiries to identify Indian children or to provide timely notice to tribes, CTFC's member tribes must rely on anecdotal or incomplete information to identify their children in state child welfare systems. In those instances where the tribes are not able to locate their children, they are prevented from providing services in a timely fashion. *Id.* ¶¶ 12-15 (describing the services that Plaintiff Yurok Tribe is unable to provide when state child welfare agencies fail to identify or provide notice of Yurok's children). This often results in negative outcomes for the children, including a delay in permanent placements.

22. Further, without the necessary data, Tribes are hindered in their ability to plan for and build needed and relevant services for their children. The types of culturally appropriate services a child needs changes depending on their unique demographics, some as simple as age and days in care, but some more complex. For example, some children may need mental health services prior to being able to benefit from educational support. Others may need special care if they have been subject to sexual exploitation or trafficking. To be effective, supportive services must be identified, developed, funded, and sustained—all of which requires data as to family and child needs.

23. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated: May 17, 2021

Respectfully submitted,

Delia Sharpe

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SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION, YUROK TRIBE, CHEROKEE NATION, FACING FOSTER CARE IN ALASKA, ARK OF FREEDOM ALLIANCE, RUTH ELLIS CENTER, and TRUE COLORS, INC.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, JOOYEUN CHANG, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, and ADMINISTRATION FOR CHILDREN AND FAMILIES,

Defendants.

Case No. 20-cv-6018 (MMC)

DECLARATION OF CHAIRPERSON JOSEPH L. JAMES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Joseph L. James, hereby state as follows:

1. The information set forth in this affidavit is based on my personal knowledge.

2. I am the Chairman of the Yurok Tribe ("Tribe"). I was elected by Primary Election on October 30, 2018.

3. The Tribe is a federally recognized Indian tribe with a 55,890-acre reservation located in Northern California. Comprised of 6,357 enrolled members and 3,908 total households—the large majority of which are family or multi-family households—the Yurok Tribe is the largest Native American tribe in California. The Tribe provides services to the 1,937 households that live in its service area, which includes Del Norte, Trinity and Humboldt Counties in California, as well as tribal members throughout North America.

4. The Tribe's ICWA-eligible or enrolled children live across North America because tribal members live across the United States.

5. The Tribe provides a variety of services through its designee Yurok Health and Human Services ("YHHS"), the Tribe's social services agency that has a title IV–E "pass-through agreement" with the State of California. As part of that work, YHHS collaborates with state and county child welfare agencies to ensure that the agencies are properly implementing ICWA to protect Yurok children.

6. The Tribe also provides direct services to children eligible for tribal membership and their families, including, but not limited to: joint intake and investigation of reports of abuse and neglect with County agencies; reunification and maintenance services designed to ensure the safety of children in their homes and placements; prevention services designed to reduce the likelihood that a child will be removed from the home; referrals to other services to strengthen families; and case management services and court intervention services for children and parents designed to ensure YHHS involvement throughout the life of a child's court case. In addition, the Tribe

intervenes and participates in ICWA cases heard in state courts throughout California and the Pacific Northwest.

7. The Tribe also maintains a Wellness Court, with separate calendars for families, adults, and youth, that provides services such as foster care placement, counseling sessions, and drug testing.

8. The 2020 Final Rule's removal of ICWA data elements harms the Yurok Tribe in at least three ways, impairing its ability to provide services to Yurok children and vindicate its rights under ICWA.

9. *First*, the 2020 Final Rule prevents the Tribe from identifying recurring ICWA implementation issues and working with state title IV–E agencies to fix those problems.

10. For example, state child welfare agencies have historically struggled to consistently identify Indian children, including Yurok children, and to provide timely inquiry and notice of such cases to the child's tribe. This issue would have been addressed by the 2016 Final Rule, which included data elements designed to track and improve state title IV–E agencies efforts to identify and notify tribes of Indian children. Among other things, the 2016 Final Rule required the agencies to report whether they inquired about a child's ICWA status with specified persons in the child's life. Agencies were required to report whether they had made inquiries with the child, the biological or adoptive mother, the biological or adoptive father, the child's Indian custodian, and the extended family. In contrast, the 2020 Final Rule requires agencies to report only whether they made "inquiries" at all as to the child's ICWA status. By removing the more detailed inquiry data elements, along with others, the 2020 Final Rule makes it much more difficult for Yurok to assess whether the title IV–E agencies within its jurisdiction are actually making the inquiries required by ICWA. This in turn makes it more difficult for YHHS to work with those agencies to improve the identification of the Tribe's children.

11. Other data elements in the 2016 Final Rule would also help the Tribe know which of its eligible and enrolled children and families are involved in the system. For example, the 2016 Rule required title IV-E agencies to report the date that the agency first discovered information indicating the child is or may be an Indian child as defined in ICWA, all federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s), and the Indian tribe that the court determined is the Indian child's tribe for ICWA purposes. Each of those elements would help the Tribe identify key decision-making points and would improve the Tribe's ability to be involved with its entire service array at a much earlier stage.

12. By making it more difficult for Yurok to identify its children, the 2020 Final Rule increases the risk that Yurok children will be removed without the Tribe's input and intervention, placed in non-Native homes, and simply be lost to the Tribe. The Rule also makes it more difficult for the Tribe to keep its children safe and provide other services. These outcomes harm the Tribe's sovereign interests and contravene its rights under ICWA.

13. For example, in a recent case, a state child welfare agency became aware of a Yurok child living in a dangerous home, but either failed to identify the child as a Yurok child or failed to provide the Tribe with timely notification of the case. Because the Tribe was not notified, we were unable to provide our services—which are designed to ensure the safety of children in their homes and placements—in a timely fashion. By the time YHHS became aware of the case and was able to intervene, events at the home had already escalated, resulting in severe injuries to the child. In such instances, proper ICWA implementation is critical because it provides the Tribe with the opportunity to protect its children and provide culturally appropriate services to families. As noted above, the 2020 Final Rule makes it more difficult for the Tribe to ensure proper ICWA implementation, and thus increases the likelihood that Yurok children will not receive the protection they need.

14. Similarly, when Yurok children are not identified in the State and County systems, the Tribe is unable to provide the educational support that Yurok foster children are entitled to receive. For example, the Tribe has a good working relationship with Del Norte County Schools, which operates a multi-disciplinary convening to ensure tribal children who are in foster care, guardianship, and/or Indian Custodianship, and who have established unmet educational needs are properly identified. Unidentified Yurok foster children will not receive this support. Nor is the Tribe Wellness Court able to provide services to the homes of ICWA-eligible children without this coordination and identification. As noted above, the Wellness Court provides a variety of services to families, including counseling, drug testing, and assisting with family reunification.

15. Unidentified Yurok children are also deprived of the Tribe's ability to design foster care exit plans tailored for tribal children. Without access to those plans, unidentified children are denied specialized tribal services such as post-foster care education and employment opportunities; transitional youth support; and supplemental education, such as cultural learning, language classes, Wellness & Healing projects, and Tribal Youth Convenings.

16. *Second*, the 2020 Final Rule impedes the Yurok Tribe's ability to accurately track the number and location of Yurok children in state care, which in turn impedes its ability to effectively administer its child welfare services through the Tribe's agency. Under the 2016 Final Rule, state child welfare agencies would have been required to report each child's tribe as formally determined by the court. The 2020 Final Rule removed that data element, requiring state agencies to report only the tribes that are *potentially* the child's tribes. This data element will not yield an accurate count of Yurok's tribal children, as state child welfare agencies are often over-inclusive when listing potential tribal affiliations at the outset of the ICWA inquiry process, including tribes of which the child is not an eligible member.

17. Without the ability to track and count its children, the Tribe cannot effectively plan for or administer the various social services and court services offered through YHHS and the Yurok Tribe's Wellness Court. For example, without an accurate count of Yurok children in state care, YHHS and its Wellness Court are unable to estimate the number of cases the Tribe may expect to transfer to tribal court, which in turn impedes a wide variety of planning decisions, such as how many caseworkers to hire, planning for service needs, and requesting allocated funds through its IV–E pass-through agreement with California.

18. Inaccurate tracking by state title IV–E agencies also forces the Tribe to spend valuable staff time and hours on ICWA inquiries from state title IV–E agencies. In the average year, the Tribe dedicates 210-280 hours per year responding to roughly 140 ICWA inquiries. Approximately 40% of that time is spent dealing with duplicates and responses regarding children that are not eligible to be tribal members. The 2016 Final Rule would have reduced the number of inquiries on behalf of ineligible children, as well as duplicates, because the agency would have to do proper inquiry to ensure the information in the notice is correct before sending it. As it stands, the errors in the notice due to lack of proper inquiry create duplicated notices and notices that do not include enough information to make a meaningful determination of tribal membership.

19. *Third*, the amount of funds the Tribe receives from California under its pass-through agreement depends on the number of children the Tribe brings into tribal court under ICWA's transfer jurisdiction provision. But, as noted above, the Tribe's ability to know and provide that information is impeded by the 2020 Final Rule since State and County agencies are not required to track and report which Tribe's children are in County care. Similarly, the lack of data on the number of Yurok children in foster care impairs the Tribe's ability to obtain other sources of funding for both YHHS and the Wellness Court, which rely on such data to apply for other state and federal funding.

20. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated: May 11, 2021

Respectfully submitted,

Joseph L. James

CHAIRPERSON, Yurok Tribe

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION, YUROK TRIBE, CHEROKEE NATION, FACING FOSTER CARE ALASKA, ARK OF FREEDOM ALLIANCE, RUTH ELLIS CENTER, and TRUE COLORS, INC.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, JOOYEUN CHANG, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, and ADMINISTRATION FOR CHILDREN AND FAMILIES,

Defendants.

Case No. 20-cv-6018 (MMC)

DECLARATION OF LOU STRETCH IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Lou Stretch, hereby state as follows:

1. The information set forth in this affidavit is based on my personal knowledge.

2. I am the Director of the Cherokee Indian Child Welfare Department and have been since July 2019. In my position I oversee 102 staff, including 9 full-time employees to determine tribal eligibility, 51 employees to handle state and tribal cases (including intake and child protective services), 7 service providers, 13 foster care certification workers, 8 adoption and guardianship workers, and 8 office support and title IV-E technical assistants. My duties include determining and implementing the policy and development of Cherokee Nation Indian Child Welfare, ensuring the maintenance of records, and seeking funding and oversight for grants.

3. Cherokee Nation's capital is located in Tahlequah, Oklahoma. The Cherokee Nation Reservation encompasses all or part of fourteen counties in northeastern Oklahoma.

4. Cherokee Nation is the sovereign government of the Cherokee people and is the largest tribe in the United States, with more than 380,000 tribal citizens residing across the country.

5. The Tribe's ICWA-eligible children live across North America.

6. Cherokee Nation is committed to protecting its inherent sovereignty; preserving and promoting Cherokee culture, language, and values; and improving the quality of life for future generations of Cherokee Nation citizens.

7. Cherokee Nation provides Indian Child Welfare services under a direct title IV–E plan, including foster care and adoption services for Indian children. As part of that work, Cherokee Nation engages in the following activities: (1) advocating for and establishing the safest and most appropriate environment for the child; (2) providing referrals and networking services to parents and children; (3) conducting home assessments to determine whether a child's living environment is safe; (4) making recommendations to courts regarding a child's best interest; (5) providing expert witness testimony in cases involving Cherokee Indian children; (6) monitoring case activity to

ensure compliance with ICWA and other relevant state and tribal laws; and (7) educating attorneys, court-appointed guardians, and families on their rights and responsibilities within the judicial system to ensure the protection of Cherokee children under federal and state law.

8. Cherokee Nation also has a nationwide Court Advocacy and Permanency Service ("CAPS") that provides advocacy for Cherokee families and children in tribal and state court systems. To ensure that Cherokee Nation and its children receive the protections offered under ICWA and similar state laws, the CAPS program sends advocates to court hearings on behalf of Cherokee children, provides planning services, and helps refer children and families to services designed to address problems that contributed to the initial removal of a child. These efforts consume a substantial amount of resources, as they require our advocates to participate in court hearings around the country.

9. Our efforts to advocate for Cherokee children and protect our rights are made far more difficult and expensive by the lack of data on ICWA implementation and by states' failures to conduct the inquiries required by ICWA. The absence of this information impairs Cherokee Nation's ability to provide direct child welfare services to its children by impeding Cherokee Nation's ability to identify Cherokee children in state child welfare systems in a timely fashion. Indeed, our mission and rights are often entirely thwarted by the unavailability of this information.

10. These harms come in numerous forms. First, Cherokee Nation is often not notified of the removal of Cherokee children, or notified too late to be able to protect those children. For example, the Cherokee Nation was not notified of a recent case in Missouri for six months after the children were removed. The parents did not receive active efforts to prevent the breakup of the family (as required by ICWA) and the children were placed in homes that did not comply with ICWA's

placement preferences.[1] By the time the Nation could move to transfer the case to tribal court, the parents were unable to remedy the issues that led to the removal of the children. No child was reunified in this case. If states were obligated to report data on the inquiries they made and other steps they took under ICWA, implementation of ICWA's requirements would improve and errors like these would be far less frequent.

11. Second, documentation errors may cause Cherokee children to be lost in state systems for years or slip through the cracks altogether. For example, in a recent case where the child was transferred to tribal court from Arkansas, the child had been marked as "non-Native" in the Arkansas system, even though they were a Cherokee citizen. Such incidents would be less common and caught more quickly if state child welfare agencies were required to report data on their inquiry efforts, and if they were required to report which tribe(s) children are associated with.

12. Third, some counties and states severely understate the number of Cherokee children in their child welfare systems. For example, in 2019, one Arkansas county stated it had 5 Cherokee children, even though the tribal social service worker had personally worked on at least double that number of cases.

13. Fourth, some state agencies send unnecessary notices to Cherokee Nation about children within their system, instead of properly conducting the specific inquiries that ICWA requires the agencies themselves to conduct. Before the Nation can provide its services in those cases, it must spend a significant amount of time determining whether or not a child is actually eligible for tribal membership. For example, in 2019, California sent nearly 3,000 notices to Cherokee Nation about children who were not in fact Cherokee children, many of which would have been unnecessary if California had made the inquiries required under ICWA. These notices require Cherokee Nation to

[1] ICWA requires child welfare agencies to prioritize placing children with their extended family or within the tribal community.

perform a substantial amount of work to determine whether Cherokee children are involved. Because of the frequency of over-notification, we need to devote five full-time staff to processing ICWA notifications. We estimate that they spend more than 4,000 hours a year working on the notices sent due to this over-identification, impeding the identification of actual Cherokee children and consequently delaying the benefits to which they are entitled under ICWA.

14. Fifth, the states' failures to make inquiries and send notices required by ICWA significantly increase the number of cases that require appeals, which consume significant resources from my staff. In California, for example, 92% of ICWA appeals involved notice or inquiry errors, many of which would have been unnecessary if California was required to collect data showing it was completing the requisite notice and inquiry processes.

15. Sixth, Cherokee Nation's internal data only includes Cherokee Nation children, even though Cherokee Nation has exclusive jurisdiction over any Indian child on its reservation under ICWA, whether or not the child is a tribal citizen of that tribe. Without federal data of the children by tribe, the Nation has no way to estimate the total number of child welfare cases it may be responsible for, which also means the Nation has no way to estimate the number of child welfare workers, attorneys, and judges it needs to hire to cover these cases.

16. This issue has become more acute in the last year following the United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In that case, the Court upheld certain aspects of an 1866 treaty that recognized the reservation of the Creek Nation. That decision was expanded to the Cherokee Nation Reservation in *Hogner v. State*, a follow up state court decision. No. F-2018-138, 2021 WL 958412 (Okla. Crim. App. Mar. 11, 2021). As a result of that decision, under ICWA, the Cherokee Nation has exclusive jurisdiction over its own reservation, including portions that the State of Oklahoma has previously treated as within its jurisdiction. Accordingly, Cherokee Nation now has jurisdiction over unknown numbers of Indian children who

live within the reservation boundaries. The Nation estimates this could be in the thousands of children.

17. The 2016 Final Rule would have addressed these issues in several ways.

18. First, by requiring state child welfare agencies to report data on each of their inquiry efforts under ICWA, the 2016 Final Rule would have ensured that state agencies are actually making the full set of inquiries in the first place. Under current practices, there typically is no mechanism to check whether agencies are making these inquiries on a regular basis.

19. Second, if Cherokee Nation had access to data on the state agencies' implementation of those inquiry requirements, the Nation could work with states through its CAPS program to improve their identification processes and limit errors. Having comprehensive ICWA data by state would allow us to focus our assistance on the most prevalent implementation issues when working with state agencies, simultaneously reducing the resources needed for such interventions and increasing their efficacy.

20. Third, if there was adequate data indicating the true number of Indian children in a state, the Cherokee Nation believes we could enter into tribal-state agreements more easily, and ensure a proper allocation of resources across the country.

21. Fourth, the 2016 Final Rule would provide us comprehensive ICWA data broken down by tribe, which would allow the Nation to determine the level of disproportionality of Cherokee children in the system. This would in turn allow us to better allocate our resources and improve our services in the areas where our children are most in need.

22. The 2020 Final Rule eliminated all of these benefits of the 2016 Final Rule, reimposing the impediments that the 2016 Final Rule would have lifted. It will perpetuate the under-identification of Cherokee children and the unnecessary notice about children who are not Cherokee; prevent CAPS workers from identifying recurring ICWA implementation issues and working with

state title IV–E agencies to fix those problems; render Cherokee Nation's CAPS services less effective and more time-consuming than they otherwise would be; divert resources away from Cherokee Nation's other activities; and prevent us from appropriately allocating resources and services to aid our children around the country.

23. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated: May 14, 2021

Respectfully submitted,

Lou Stretch

Lou Stretch
Director Indian Child Welfare, Cherokee Nation

EXHIBIT D

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NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION, YUROK TRIBE, CHEROKEE NATION, FACING FOSTER CARE IN ALASKA, ARK OF FREEDOM ALLIANCE, RUTH ELLIS CENTER, and TRUE COLORS, INC.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, JOOYEUN CHANG, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, and ADMINISTRATION FOR CHILDREN AND FAMILIES,

Defendants.

Case No. 20-cv-6018 (MMC)

DECLARATION OF AMANDA METIVIER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Amanda Metivier, hereby state as follows:

1. I am the co-founder and a board member of Facing Foster Care in Alaska ("FFCA") and I am currently acting as Executive Director.

2. I am submitting this Declaration in support of Plaintiffs' Motion for Summary Judgement to prevent defendant agencies from implementing the May 12, 2020 rule titled "Adoption and Foster Care Analysis and Reporting System" (the "2020 Final Rule").

3. **FFCA And Its Members.** FFCA is a 501(c)(3) nonprofit membership organization comprised of current and former foster youth. FFCA is dedicated to improving the foster care system in Alaska, developing leadership skills among current and former foster youth, and creating a network of peer support that is a lifeline for many foster youth and alumni. FFCA's mission is to improve the foster care system through sharing members' experiences, supporting and educating youth and social services, and implementing positive change in society as a whole.

4. FFCA members include youth currently in foster care and alumni who are willing to participate in FFCA and are dedicated to improving the foster care system for themselves and others. Membership represents a wide range of ages, including: Youth ages 15 and older who are currently in foster care; Foster care alumni ages 15 and older; and Alumni/Elders ages 21 and older. FFCA currently has around 300 active members.

5. As part of FFCA membership, foster youth and alumni gain working knowledge of Alaska's child welfare system apart from that of their own experience, develop skills in public speaking and systemic reform-focused advocacy, and have a unique opportunity to connect with their peers throughout the state. Members connect with peers at FFCA annual retreats and FFCA has offered virtual opportunities for youth to gather and support each other during the pandemic.

6. FFCA members are expected to: advocate to better the foster care system; positively engage in a network of peer support; and educate and empower foster youth and society to make

change. In addition, several FFCA members serve on FFCA's Statewide Youth Leadership Board, which includes representatives from various communities and regions of Alaska, a statewide representative, and a community relations liaison.

7. FFCA has two full-time staff, and we are in the process of hiring a third. We also hire foster youth and alumni as contractors and consultants to facilitate training and share their expertise. I currently serve as Executive Director (a voluntary position) and Sarah Redmon is Project Coordinator and Deputy Treasurer. Our new staff person will assist, as part of their duties, with disbursing money from HHS to youth who are eligible to receive independent living funds. As staff members, we also develop and facilitate trainings and retreats for FFCA members, coordinate requests for youth to speak at events (such as trainings), and manage training and other contracts.

8. **FFCA's Mission-Driven Activities**. To advance its mission, FFCA staff and its members conduct various activities.

9. *First*, we regularly advocate at the state level for legislation, regulations, policies, and practices that will improve the safety, permanency, and well-being of youth in the foster care system, including LGBTQ youth and Native American / Alaska Native ("AI/AN") youth. As part of that work, FFCA mentors its members to improve their ability to advocate for themselves and for policy changes that will improve the experiences of foster youth. For example, FFCA members have successfully advocated for millions of dollars to be included in the state operating budget for youth who are older teenagers or young adults and are leaving (or transitioning out of) foster care.

10. To bolster their advocacy efforts, FFCA provides foster youth and alumni opportunities to share their lived expertise about life in foster care with child welfare staff, government officials, and the broader community. Among other topics, efforts cover the foster youth's experiences and the systemic challenges they face, as well as how to positively engage and collaborate with such youth. For example, for many years FFCA members have shared their experiences in care at judicial

and magistrate conferences to educate judges about systemic issues for youth and to encourage judges to allow youth to participate in court hearings that directly impact their lives. Likewise, we have helped our members share their experiences with policy makers, including the State of Alaska Office of Children's Services ("OCS") (Alaska's state child welfare agency)[1] leadership, state legislators, and other community stakeholders as part of our efforts to improve the foster care system. Similarly, FFCA recently participated in a campaign to share information with the community about how youth's social security benefits are kept by the state and utilized to offset foster care costs, even though youth are placed into care involuntarily and through no fault of their own.

11. *Second*, FFCA provides direct services and support to current and former foster youth through (i) education, (ii) peer support, and (iii) individual assistance navigating the foster care system and the transition to adulthood. As to education, we conduct various trainings and prepare educational materials that cover foster youths' rights and the resources available to them. For example, FFCA is actively engaging in efforts to educate foster youth and alumni about federal funds recently allocated by Congress for youth, like many FFCA members, whose health and income have been negatively impacted by the Covid-19 pandemic. As part of this effort, we have been informing youth about eligibility criteria for these funds and assisting them with access. Similarly, we contract with OCS to host quarterly retreats through OCS's Independent Living Program designed to help foster youth develop the skills and resiliency that are key to their transitions to adulthood. Through interactive sessions and presentations, FFCA's retreats focus on a variety of topics, such as the legal rights that youth have while in the foster care system, reproductive health, healthy relationships, cooking, career and job skills, and higher education.

[1] The Office of Children's Services is Alaska's state child welfare agency. Its mission is to ensure "the safety, permanency, and well-being of children by strengthening families, engaging communities, and partnering with tribes." See http://dhss.alaska.gov/ocs/Documents/MissionVisionPrinciplesValues.pdf.

12. As to direct individual assistance, we work to ensure that our members have access to services and that their needs are met. To that end, we field calls from FFCA members who are having problems while in foster care or who have exited care, but are in need of assistance related to homelessness, justice system involvement, lack of income to meet their basic needs, and other challenges. To assist them through those challenges, we help our members locate and navigate available resources, including by helping them find housing, assisting them with applications for government benefits (such as Medicaid), helping them navigate juvenile and criminal justice systems, and referring them to other support services (such as counseling or medical care). We also advocate for youth vis-à-vis their case workers, guardians ad litem, attorneys, and other professionals in the system to ensure that professionals understand and are responsive to the youth's needs.

13. *Third*, FFCA provides community education and training to ensure that individuals involved in the child welfare system—such as child welfare staff, judges, child advocates, tribal advocates, service providers, educators, and foster parents—have the tools to support foster youth throughout their experience in the foster care system. In the past, this has included trainings on the ways in which caregivers can provide safe and supportive environments for LGBTQ youth and reduce the disproportionately high representation and poor outcomes of LGBTQ youth in care, including by increasing the number of safe and supportive foster homes. FFCA trainings have also addressed the ways in which caregivers can allow youth—especially Alaska Native youth—to practice their cultural traditions.

14. **FFCA's Need for Sexual Orientation and ICWA Data**. As part of our advocacy and training efforts, we regularly rely on data produced by OCS to the Adoption and Foster Care Analysis and Reporting System ("AFCARS").[2] OCS also utilizes the information collected via

[2] Consistent with its obligations under federal law, OCS collects demographic information on youth in foster care (in

AFCARS in annual reports it issues about its performance and the outcomes of children in its care.[3] FFCA uses these reports and statewide data in our advocacy with legislators and other policy makers, as part of the trainings we provide, and in work groups and committees we participate in, such as the Alaska Court Improvement Project and the Child in Need of Aid Rules Committee.

15. Currently, however, OCS does not collect sexual orientation or gender identity information for youth in care. Nor does it collect information related to many important requirements of the Indian Child Welfare Act ("ICWA"). And, while the 2020 Rule mentioned the Child and Family Services Review ("CFSR") as one way to measure the quality of services and experiences for LGBTQ+ youth in care as a substitute for AFCARS data collection, OCS's most recent CFSR report contains no mention of LGBTQ+ youth or the terms sexual orientation or gender identity.[4] Accordingly, FFCA does not have access to such information.

16. Obtaining this information is critical to FFCA's ability to understand and address the challenges faced by its members. Through a series of surveys and through our work on behalf of individual members, FFCA has observed that LGBTQ+ and Alaska Native youth are overrepresented in Alaska's foster care system and experience disproportionately negative outcomes.

17. For example, in a 2020 survey we conducted of our members, approximately twenty-five percent of those who responded identified as LGBTQ+. In the same survey, around forty percent of respondents identified as Alaska Native and, of those, the majority were enrolled in a tribe in

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Alaska, young adults up to age 21 may remain in care voluntarily), which it reports to the Administration for Children and Families ("ACF")—a division of the U.S. Department of Health and Human Services ("HHS")—for inclusion in the AFCARS dataset.

[3] See Office of Children's Services Annual Progress and Services Report Fiscal Year 2020, available at http://dhss.alaska.gov/ocs/Documents/Publications/pdf/2020_APSR.pdf.

[4] Child and Family Services Review, 2017 Statewide Assessment, available at http://dhss.alaska.gov/ocs/Documents/CFSR.pdf.

Alaska.[5] A smaller subset of FFCA members who responded to the survey identified as Alaska Native and LGBTQ+.

18. In a second survey of FFCA members about their experiences in care, those members who identified as LGBTQ+, including some who are Alaska Native, reported experiencing discrimination related to their identity and expression while in OCS's custody and placed out of home. The discrimination they experienced ranged from being denied access to affirming services (such as gender-affirming medical care) and community supports (such as attending local LGBTQ+ Pride celebrations), to requirements to attend "sex offender" treatment solely because of their sexual orientation, to being sent to so-called "conversion" therapy to change their sexual orientation or gender identity. In addition, LGBTQ+ members reported not having foster home placements available to them on account of their identity, resulting in placement in a group home or other congregate care settings. Some members had experienced homelessness due to lack of placements that were supportive of their identities. A few LGBTQ+ members who responded to the survey experienced multiple forms of discrimination related to their identity or expression while in care.

19. These survey results are consistent with the many requests for assistance and advocacy that FFCA staff have received from our LGBTQ+ members on a regular basis since our founding eighteen years ago regarding the discrimination, mistreatment, and harm they have experienced related to their identity and expression while in care.

20. As an example, OCS recently placed a sixteen-year-old girl in its care, who is a FFCA member, Alaska Native, and transgender, in a homeless shelter in Anchorage because there were no foster homes available for her. Although OCS pays for beds in the shelter for youth in its care, they

[5] FFCA can compare data about race from our own survey of FFCA members with data gathered by OCS because AFCARS requires OCS to collect data about the race of children in care. For example, we know that our membership is slightly less than the 63.6% of American Indian/Alaska Native children in care reported by OCS, but that our membership does reflect the over-representation of AI/AN children in care, who represent only 27.9% of the general population. See http://dhss.alaska.gov/ocs/Documents/icwa/pdf/TSCG-Statewide.pdf.

were all occupied and so our member was not allowed to remain in the shelter during the day and had no place to store her belongings. She had no ability to participate in virtual school and had to remain out in the community until 10 pm each night. I spent time contacting members of her team to encourage that they find a suitable placement and assisted her with navigating challenges she faced during the day due to lack of supervision and lack of educational programming. Before this recent placement, she had shared with me that placement in a homeless shelter was her biggest fear due to the high levels of violence and victimization faced by transgender women in those settings.

21. FFCA staff have also been asked by Alaska Native FFCA members to advocate on their behalf when they experienced discrimination related to their identity while in foster care. For example, some foster homes have not been supportive of our members' cultural traditions, such as offering traditional food and engaging in religious practices. Other homes have declined to facilitate a connection with our members' parents, relatives, or other tribal members. And still others have failed to provide assistance with maintaining connections to our members' Alaska Native heritage and cultural practices. FFCA members who are LGBTQ+ and Alaska Native have also reached out for assistance related to harm and discrimination related to both their race and their sexual orientation, gender identity, or gender expression. These calls result in FFCA staff members devoting time and resources to addressing the immediate harm (such as by contacting OCS staff) and to advocacy related to the systemic issues, such as the lack of foster family homes that are consistent with ICWA preferences.

22. **The 2020 Final Rule's Harms to FFCA**. The 2020 Final Rule eliminated data elements from the 2016 AFCARS Rule that would have required OCS to ask all FFCA members in foster care age fourteen and older about their sexual orientation, allowing them to voluntarily disclose or not.[6] For those FFCA members in care who are Alaska Native, the 2020 Final Rule eliminated data

[6] The 2020 Rule also eliminated the requirement that agencies collect information about the sexual orientation of guardians, foster parents, and adoptive parents.

elements that would have required OCS to collect information in their cases related to ICWA, such as the tribe they are a member of[7] and whether their placement while in care is with relatives or tribal members (the preferred options under ICWA).

23. The 2020 Final Rule's removal of ICWA and sexual orientation data elements frustrates FFCA's mission by impeding its ability to advocate for an improved foster care system, obtain funding for its activities, and provide services to foster youth and young adults involved in the child welfare system, including FFCA's members. As a result, these activities are more time-consuming and less effective, diverting resources away from other services FFCA provides.

24. *First*, the removal of both types of data impairs FFCA's ability to effectively advocate for legislation, regulations, and policies that would improve outcomes and services for AI/AN youth and LGBTQ+ youth in the foster care system.

25. To begin, the removed data elements would help FFCA identify policies that would improve the foster care system by improving FFCA's understanding of the problems faced by AI/AN and LGBTQ+ youth. With respect to tribal youth, the ICWA implementation data would shed light on the precise ICWA protections that tribal youth in Alaska are not receiving. For example, having data that tracks the tribes to which youth belong would allow FFCA—through its role on committees that are pursuing the wellbeing of Alaska Native youth in care, such as the Tribal State Coalition—to understand and address regional differences in placements and outcomes. Likewise, data that tracks whether Alaska Native youth are placed with relatives or tribal members would allow FFCA to target its advocacy efforts to address particular issues around OCS's family-finding process and identifying placements that promote the wellbeing of Alaska Native youth.

[7] There are 229 federally recognized Tribes in Alaska, out of the "Alaska Native" demographic. There are many more Tribes that are not federally recognized. *See* http://dhss.alaska.gov/ocs/Pages/icwa/default.aspx.

26. For both types of youth, the ICWA and sexual orientation data would, when compared against data tracking other outcomes (e.g., homelessness and abuse), indicate the extent to which those youth disproportionately experience negative outcomes. If FFCA had access to such data, it would be able to shape its policy agenda to better address the needs of both tribal and LGBTQ+ youth (and LGBTQ+ AI/AN youth) in the foster care system, including efforts to reduce the over-representation of both populations in care.

27. In addition, the removed ICWA and sexual orientation data would improve FFCA's ability to effectively advocate for reform by providing forceful and persuasive evidence that such reform is necessary. For example, in a recent debate about whether services provide by OCS should be divided into two separate agencies, data related to the experiences and outcomes for LGBTQ+ youth and Alaska Native youth would have helped FFCA articulate the harm to these youth caused by OCS having a less unified system.

28. For LGBTQ+ youth in particular, the sexual orientation data would indicate how many LGBTQ+ youth are in Alaska's foster care system, which would provide an evidentiary basis to rebut assertions that policy reform is unnecessary due to a supposed low number of LGBTQ+ youth.

29. Indeed, we have historically faced resistance when trying to pursue reforms because of a lack of data on LGBTQ+ youth. Further, for the past three years, FFCA has developed legislation that would establish a statutory bill of rights for youth in care, including protection against discrimination on the basis of race, religion, sexual orientation, and gender identity, among other protected classes. We also are working on court rules, as part of a committee consisting of child welfare stakeholders, regarding when children in care are entitled to appointment of an attorney. As part of that effort, we are encouraging LGBTQ+ identity for older youth to be a criteria due to the challenges our LGBTQ+ members and other LGBTQ+ youth face in care. As we have worked on each of these reform initiatives, we have been asked how many LGBTQ+ youth are in the State of

Alaska's care and faced resistance related to the importance of these initiatives because we could not demonstrate the need with data.

30. Despite FFCA having shared the challenges LGBTQ+ youth face in care for over eighteen years with OCS, OCS does not include any mention of LGBTQ+ youth or the terms sexual orientation and gender identity in its Child Protective Services Manual,[8] its Resource Family Handbook,[9] its "Transforming Child Welfare Outcomes for Alaska Native Children" strategic plan,[10] or its most recent Child and Family Services Review Report, or its Annual Progress and Services Report for 2019[11] or 2020.[12] OCS's Annual Progress and Services Reports for 2019 and 2020 cite to AFCARS data when describing the demographics of youth in their care and the outcomes of youth in their care. Without a requirement to collect data related to sexual orientation, we will continue to have to devote resources to convince OCS to focus its efforts on reducing overrepresentation, preventing disproportionately harmful experiences and outcomes, and including LGBTQ+ information in manuals and handbooks.

31. Likewise, the ICWA data that was removed by the 2020 Final Rule would improve FFCA's ability to advocate because it would provide persuasive evidence of the need to improve the state's implementation of ICWA. For example, in its work to improve Alaska's judicial processes for foster care through the Court Improvement Program, FFCA could cite to the removed ICWA data to advocate for reforms that would improve the state courts' implementation of ICWA,

[8] Alaska Child Protective Services Manual, available at http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf.
[9] Alaska Resource Family Handbook, available at http://dhss.alaska.gov/ocs/Documents/Publications/pdf/ResourceFamilyHandbook.pdf.
[10] "Transforming Child Welfare Outcomes for Alaska Native Children, Strategic Plan 2016 – 2020, Report and Recommendations, April 206, available at http://dhss.alaska.gov/ocs/Documents/Publications/pdf/AK-Transforming-Child-Welfare-Outcomes_StrategicPlan.pdf.
[11] See 2019 Annual Progress & Services Report, State of Alaska, Department of Health and Human Services, Office of Children Services, available at http://dhss.alaska.gov/ocs/Documents/Publications/pdf/2019_APSR.pdf.
[12] Office of Children's Services Annual Progress and Services Report Fiscal Year 2020, available at http://dhss.alaska.gov/ocs/Documents/Publications/pdf/2020_APSR.pdf.

such as by providing training on the evidentiary findings that courts must make before removing a Native Alaskan child from their home.

32. Finally, the removed data would provide a useful benchmark that would allow FFCA to determine whether more advocacy in a particular area is warranted. If OCS collected and reported sexual orientation and ICWA data, FFCA could measure OCS's performance for LGBTQ+ youth and Alaska Native youth. Likewise, FFCA could compare outcomes for such youth with outcomes for their peers who are White or who do not identify as LGBTQ+.

33. In each of the advocacy efforts referenced above, by removing the ICWA and sexual orientation data elements from AFCARS, the 2020 Final Rule renders FFCA's advocacy efforts less effective and more time-consuming than they otherwise would be, forcing FFCA to divert resources away from its other activities (such as providing peer-to-peer support for youth or training for professionals).

34. *Second*, the removal of the ICWA and sexual orientation data impedes FFCA's ability to improve its direct services to youth, including the trainings it conducts for youth. If FFCA had access to the abandoned data, it would better understand the needs of, and problems faced by, both tribal and LGBTQ+ youth. This would allow FFCA to shape the content of its trainings to address those needs. For example, if the removed sexual orientation data, when compared against other AFCARS data elements, indicated that LGBTQ+ youth disproportionately experience negative outcomes, such as homelessness, FFCA might adapt its training to include content to address such issues. By removing the ICWA and sexual orientation data elements from AFCARS, the 2020 Final Rule renders FFCA's direct services less effective than they otherwise would be.

35. *Third*, the removal of the ICWA and sexual orientation data impedes FFCA's ability to improve trainings for adults involved in the child welfare system, including child welfare staff and foster parents. But for the 2020 Final Rule, FFCA would use the eliminated data to improve its

trainings on the unique challenges faced by AI/AN children and the ways in which caregivers can provide safe and supportive environments for LGBTQ+ youth. Specifically, FFCA would rely on the data to convey the significance of challenges faced by tribal and LGBTQ+ youth, would update the trainings, such as the one we recently had at the Alaska Magistrates Conference, to fully capture the nature of those challenges as reflected in the removed data, and would modify its recommendations regarding how to support youths accordingly. For example, at a recent training provided to new caseworkers through FFCA's contract with the state, trainees were asked to introduce themselves and the pronouns they use. Some resisted and asked for the justification for sharing their pronouns. When informed that sharing pronouns with youth clients would help some LGBTQ+ youth feel seen and affirmed, workers asked why such practice was necessary. If FFCA had access to the sexual orientation data, FFCA could have responded definitively about the numbers of LGBTQ+ youth in care—and their negative outcomes—to provide an important justification. By removing the ICWA and sexual orientation data elements from AFCARS, the 2020 Final Rule renders FFCA's training efforts less effective than they otherwise would be.

36. The 2020 Final Rule also harms FFCA by impairing its ability to obtain funding. Currently, FFCA is unable to apply for certain LGBTQ+-related grants that require applicants to submit information on the number of LGBTQ+ youth that would be served by the applicant. For example, FFCA would have applied for the Pride Foundation Grant (intended to support organizations serving LGBTQ+ populations) in past years in order to fund mental health services for LGBTQ+ youth, but was unable to do so because the grant application required information on the number of LGBTQ+ youth that FFCA would be able to serve in Alaska's foster care system. But for the 2020 Final Rule, FFCA would be able to apply for such grants going forward.

37. Similarly, FFCA is currently working on an application for a grant from the Andrus Fund to prioritize Alaska Native communities. With data from the 2016 Rule, FFCA would be better able

to articulate the outcomes of its Alaska Native members as compared to their non-Native peers. This would help to demonstrate FFCA's need for funding for additional advocacy. Further, with data regarding sexual orientation and comparing it to race and ethnicity we would be able to include specific information about the experiences of Alaska Native LGBTQ+ members in the Andrus Fund grant application. Without such data, it is difficult for FFCA to fully articulate the need and how its activities and advocacy would address disparities.

38. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated: May 14, 2021

Respectfully submitted,

Amanda Metivier

Amanda Metivier

EXHIBIT E

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION, YUROK TRIBE, CHEROKEE NATION, FACING FOSTER CARE IN ALASKA, ARK OF FREEDOM ALLIANCE, RUTH ELLIS CENTER, and TRUE COLORS, INC.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, JOOYEUN CHANG, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, and ADMINISTRATION FOR CHILDREN AND FAMILIES,

Defendants.

Case No. 20-cv-6018 (MMC)

DECLARATION OF GERALD W. PETERSON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Gerald W. (Jerry) Peterson, hereby state as follows:

1. I am the Executive Director of Ruth Ellis Center ("REC").

2. I am submitting this Declaration in support of Plaintiffs' Motion for Summary Judgement to prevent defendant agencies from implementing the May 12, 2020 rule titled "Adoption and Foster Care Analysis and Reporting System" (the "2020 Final Rule").

3. Founded in 1999, REC is a 501(c)(3) non-profit organization that has established a national reputation for quality and innovation in providing trauma-informed services for lesbian, gay, bi-attractional, transgender and questioning (LGBTQ+) youth, and young adults in Michigan, with an emphasis on young people of color, youth experiencing homelessness, youth involved in the child welfare and juvenile justice systems, and/or youth experiencing barriers to health and wellbeing.

4. It is our mission to create opportunities for LGBTQ+ young people to build their vision for a positive future. Our vision is a world where LGBTQ+ young people are safe and supported no matter where they go. As we have continued to evolve, so have the ways we help our young people. At REC, we work toward our vision through a growing number of services and programs that support the LGBTQ+ youth and young adult community—from providing outreach and safety-net services, to skill-building workshops and HIV prevention programs.

5. REC provides services through five core programs. First, REC runs a health and wellness center that provides fully integrated primary and behavioral health care, including care for long-term medical issues, STI testing treatment, HIV prevention services, and transition care for transgender youth. The latter includes gender-affirming hormone treatment, birth control, and screening for medical emergencies. In addition to providing these services, REC seeks to track youth access to healthcare while in government systems of care. We provide the aforementioned services to youth in Michigan foster care who either choose to access services from REC or are referred to

REC by child welfare caseworkers who know that REC will be affirming and supportive of youth's identity and expression.

6. Second, REC's drop-in center provides support groups, case management, and a safe place for LGBTQ+ youth and young adults to connect with each other and their community. Youth in Michigan's foster care system access our drop-in center. Over the years, such youth have consistently accessed the drop-in center for a variety of reasons. Oftentimes they are experiencing homelessness due to a lack of an affirming placement while in Michigan's foster care system. At other times, they have exited the foster care system without a permanent home and are, therefore, experiencing homelessness or housing instability (or are otherwise in need of assistance and support).

7. Third, REC operates a Center for Lesbian and Queer Women and Girls that provides outreach and case management services to girls and women, including education, workforce development, health and wellness, family/parenting support, juvenile justice, and foster care support services. Queer women and girls in Michigan's foster care system access these services regularly, including women and girls who have both a juvenile justice and a foster care case—so called "dually-involved" or "crossover youth." In my role at REC, I have observed that Black LGBTQ+ youth are disproportionately involved in the juvenile justice system compared to their White LGBTQ+ peers. Conflict over a youth's identity or expression in foster care settings often leads to juvenile justice involvement as does exposure to policing due to homelessness or youth engaging in survival crimes while experiencing homelessness. This pattern frequently occurs for the lesbian and queer girls accessing our services, as well as other LGBTQ+ youth.

8. Fourth, through the Ruth Ellis Institute, REC advocates for policies to reform both Michigan's foster care system and nation-wide systems of care, including the child welfare system, to ensure that LGBTQ+ youth can be safe and supported. This advocacy has included, among other

things: encouraging the State of Michigan to collect sexual orientation- and gender identity-related demographic information for youth in foster care; to implement sexual orientation, gender identity, and gender expression ("SOGIE") nondiscrimination protections in state law and policy; and to deliver training to all professionals in Michigan's child welfare system on how to affirm and support LGBTQ+ youth in care in order to improve youth's safety, well-being and permanency[1] outcomes. At the national level, REC is a recognized leader in providing services to children and families to minimize behaviors and actions by family that are harmful or rejecting of a LGBTQ+ youth's identity and to encourage family acceptance. REC has shared its work in the community, in collaboration with Michigan's child welfare system, at national conferences, and at meetings with federal policymakers regarding system improvement for LGBTQ+ youth.

9. Fifth, REC operates several pilot programs designed to study how novel direct services and trainings might improve outcomes for LGBTQ+ youth. Some pilot programs have been developed and operated as a part of REC's role as a demonstration site for ACF's Children's Bureau's LGBTQI2-S Quality Improvement Center.

10. As an example, in recognition of the importance of sexual orientation and gender identity data to its other programs, REC is currently operating a pilot program to train foster care workers in three Michigan counties on collecting such data in a culturally competent manner. Through this training, REC has helped foster care workers to collect data in a manner that ensures youth's confidentiality is protected, that youth are protected from harm and discrimination if they disclose their identity, and that questions about identity are posed in a respectful and affirming manner. This pilot has demonstrated the absolute necessity of collecting such data for improving outcomes. Also,

[1] Achieving "permanency" means exiting care to a permanent family-based living situation, whether that is reunification with the parent(s), guardianship, or adoption.

it has shown that while child welfare agencies need and greatly benefit from skilled training and technical assistance, quality and safe SOGI data collection in the child welfare system is possible.

11. Similarly, and as referenced above, REC is conducting a pilot program to work directly with the families of LGBTQ+ youth to improve and track long term outcomes of family acceptance of their child's identity. Family acceptance is understood to play a significant role in improving outcomes for such youth, including by reducing the over-representation of LGBTQ+ youth in foster care. REC is currently working with the State of Michigan child welfare system to focus efforts on identifying when family conflict is present before or at the time of removal, a data element in both the AFCARS 2020 Final Rule and the 2016 Rule. As child welfare agencies focus more on providing services to families to prevent removal and offer services that allow children to remain at home due to requirements in the recent federal Family First Prevention Services Act, REC is playing a critical role in ensuring those efforts in Michigan are inclusive of the safety and well-being of LGBTQ+ youth. As part of that work, REC has advocated for Michigan to collect SOGIE-data, so it is possible to track long-term outcomes, the only way to measure the success of these efforts.

12. In a related effort to improve long-term outcomes for LGBTQ+ youth in care, REC is currently shifting from operating a group home specifically for LGBTQ+ youth to providing training and technical assistance on LGBTQ+-supportive programing for all group homes in Michigan. The majority of youth served in REC's group home were involved in the foster care system. Many ended up in group care due to an insufficient number of foster homes that would accept and support them. We shifted to working on improving the quality of all group homes because we could not meet the demand for group care for LGBTQ+ youth. In addition, moving LGBTQ+ youth to REC's group home often meant that youth were no longer in their home community or near family or had to change schools – disruptions that are harmful.

13. REC's mission and its programs for and advocacy on behalf of LGBTQ+ youth will be harmed and less effective if the 2020 Final Rule is implemented and sexual orientation data for youth 14 and over and for LGBTQ foster parents, adoptive parents, and guardians is not available for the State of Michigan and at the national level through AFCARS.

14. Through my work over the past eight years at REC and the associated advocacy and collaboration with Michigan's child welfare system, I have observed that LGBTQ+ youth are over-represented in care compared to their non-LGBTQ peers and experience worse outcomes – such as physical and emotional harm, lack of supportive and affirming services (including medical and behavior health care), placement in group homes or other congregate care settings rather than a family home, heightened justice system involvement, and exiting care to homelessness. My observation of over-representation has been reflected in studies done in both Los Angeles[2] and New York City,[3] which have shown that LGBTQ+ youth represent between nineteen to thirty-four percent of youth in the foster care system, although an online review of national studies documents that they represent only five to ten percent of the general population. The 2013 Los Angeles study was funded by HHS/ACF, in part, to confirm the overwhelming anecdotal information from the field, and other more limited studies, that shed light on the over-representation problem. Another more recent HHS/ACF study found that thirty-two percent of youth in Cuyohoga County, Ohio's foster care system identify as LGBTQ+.[4] The 2013 Los Angeles study, the 2020 New York City study, and the 2021 Ohio study all found that youth there have experienced some of the same

[2] Bianca D.M. Wilson, et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, 6 (2014), https://www.acf.hhs.gov/sites/default/files/documents/cb/pii_rise_lafys_report.pdf.

[3] Theo G.M. Sandfort, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City: Disproportionality and Disparities*, 5 (2020), https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf.

[4] Matarese, M., Greeno, E., Weeks, A., Hammond, P., *The Cuyahoga youth count: A report on LGBTQ+ youth's experience in foster care*, The Institute for Innovation & Implementation, University of Maryland School of Social Work (2021), https://theinstitute.umaryland.edu/our-work/national/lgbtq/cuyahoga-youth-count/.

challenges in care and disproportionately poor outcomes that I have observed for LGBTQ+ youth in care in Michigan. Given that 85% of youth in care in Michigan are African American (AFCARS currently requires data collection of the race of children and youth), compared to representing about 14% of the general population, there is significant intersectional overlap between race and LGBTQ+ identity when evaluating and addressing overrepresentation in government system of care and outcomes.

15. The 2020 Final Rule's removal of sexual orientation data elements impairs and frustrates REC's mission and activities by impeding its ability to advocate for reforms that improve the treatment and outcomes of LGBTQ+ youth, including LGBTQ+ youth of color, to provide and connect LGBTQ+ youth to its trauma-informed services, and to obtain funding for its services.

16. *First*, the removal of sexual orientation data impairs the ability of REC to effectively advocate through the Ruth Ellis Institute for legislation, regulations, and policies that would ensure that LGBTQ+ youth are safe and supported in the child welfare system.

17. Specifically, the removed data elements would help REC to identify the most effective policies—and advocate for their development and implementation by the State of Michigan—by improving REC's understanding of the problems faced by LGBTQ+ youth, especially with respect to race, permanency, placement in congregate care, homelessness, and other barriers to health and well-being. While, as referenced above, I see these systemic problems through the lens of the youth REC serves, we have no statewide data to document these challenges and to compare to our observations.

18. The sexual orientation data would indicate how many LGBTQ+ youth are in Michigan's child welfare system and, when compared against data tracking other outcomes and aspects of identity, the extent to which those youth disproportionately experience homelessness, trafficking, and other barriers to well-being.

19. Through AFCARS data, as mentioned above, we know that youth of color are over-represented in Michigan's child welfare system and nationally and have worse outcomes than their White peers in care. With data regarding the sexual orientation of youth in care, we would be able to cross reference that information with data on race. REC would then be able to advance a policy agenda that addresses those barriers and accounts for any differences in experiences and outcomes by race for LGBTQ+ youth. This is critical to one aspect of our core mission, to serve LGBTQ+ youth of color, and to better meet the day-to-day, real-life needs of the youth we serve, who are majority youth of color. Specifically, this data can be utilized to target intersectional issues of disproportionality, including race and ethnicity, by providing targeted insight into exactly who is experiencing overrepresentation and how REC can best serve these populations. Also, while we suspect that LGBTQ+ youth of color face some of the worst outcomes of any population of youth in foster care, we have no data to demonstrate why targeted interventions and additional programs are necessary to address these disparities and, ultimately, to show what works and why.

20. Sexual orientation data would also improve REC's ability to advocate effectively for reform by providing forceful and persuasive evidence that such reform is necessary. Historically, REC has encountered resistance from state policymakers to certain proposed policies. For the past eight years, nearly every time I have raised the issue of the need to improve conditions and outcomes for LGBTQ+ youth in care, Michigan policymakers and other child welfare professionals, have asked, "How many are there?" I have been unable to answer this question due to the lack of statewide SOGI-data. For example, REC encountered exactly this problem when it proposed that Michigan reform its foster care licensing rules to require that bed assignments be made based on where the child feels safest as opposed to the sex the child was assigned at birth. Because REC could not demonstrate that there were a sufficient number of LGBTQ+ children and youth in Michigan's

system to justify the cost of reform, policymakers did not take action then and we have yet to see concrete reform.

21. While there is increasing anecdotal recognition of placement issues in residential treatment, the lack of data prevents providers from instituting equitable and ethical solutions. The scant data causes limitations on identifying evidence-based solutions to the barriers LGBTQ+ children and youth experience and hinders the ability of organizations to justify maintaining or expanding programs. By removing the sexual orientation data elements from AFCARS, the 2020 Final Rule renders REC's advocacy efforts less effective and more time-consuming than they otherwise would be, forcing REC to divert resources away from its other activities. Instead of being able to rely on data collected from the state (and resulting nationwide data from all states), REC must divert resources to sharing its own experiences, working with REC youth clients to tell their own stories, and reaching out to child welfare professionals and advocates across the state to gather and compile information. Such efforts take staff time, resulting in time away from providing services to youth and additional cost to the organization.

22. *Second*, the removal of sexual orientation data impedes REC's ability to provide direct services to LGBTQ+ youth. If REC had access to the sexual orientation data, in combination with data tracking other outcomes (*e.g.*, homelessness and placement outcomes), it would be better positioned to assess the extent to which its pilot programs are successful in improving the well-being of LGBTQ+ youth. For example, if REC had access to such data, it could assess the impacts of its pilot program to help families accept the identity of their LGBTQ+ children by evaluating whether outcomes improved over time for LGBTQ+ youth in the geographic areas included in the program. Specifically, REC could assess whether LGBTQ+ youth experience improved placement outcomes, reduced homelessness, and reduced over-representation in care due to family rejection. The ability to measure success is essential for REC to justify the value of our services to funders

and to convince youth, families, and child welfare professionals that our programs are helpful and valuable. Further, the Family First Prevention Services Act, in addition to encouraging prevention work, will require state child welfare agencies to use evidence-based services and programs. Without data, it is impossible to show evidence-based outcomes.

23. *Third*, the 2020 Final Rule also harms REC by impairing its ability to obtain funding to provide its services. Both private funders and Michigan's Department of Health and Human Services ("MDHSS")—which funds many of REC's services through government contracts and grants—are reluctant, and often unwilling, to provide grants or contracts for services without data that shows how many LGBTQ+ youth will be served. Similarly, REC would almost certainly be able to expand several of its programs if AFCARS required child welfare agencies to collect the sexual orientation data because the data would show a critical need for such programs.

24. For example, as referenced above, REC is currently conducting a pilot program in three counties to train social workers and other professionals working within the child welfare system on how to collect sexual orientation and gender identity data—which will in turn be useful for REC's other activities once collected—in a manner that is culturally competent and affirming. If all county child welfare agencies in Michigan were required to collect and report those data to the state as part of AFCARS, MDHSS would likely fund an expanded program to ensure that other counties receive training on data collection. Similarly, if REC had access to statewide data that confirmed the over-representation of youth in care and their disproportionate placement in congregate care, we could show that programs focused on family acceptance and an expansion of affirming family home placements are essential to address existing disparities. This would allow REC to justify additional requests for grant funding or funding from MDHSS.

25. The removal of the sexual orientation data element for foster parents, adoptive parents, and guardians also harms REC's mission and negatively impacts its ability to serve youth. Lack of

data hampers REC's policy advocacy to increase the number of affirming foster placements for LGBTQ youth because, without data, it is impossible to accurately measure efforts MDHSS has made to recruit and retain LGBTQ+ families, who are among the most likely to support and affirm LGBTQ+ youth. In addition, the State of Michigan has been involved in legal proceedings in recent years regarding whether state-funded child placing agencies may refuse to serve and license same-sex couples who wish to be foster parents. Without data, it is impossible for REC to most effectively demonstrate the harm to children resulting from fewer affirming family placements caused by discriminatory policies that exclude potential foster parents. In addition, the historical and current lack of foster homes that are affirming and supportive of LGBTQ+ youth has caused REC to devote resources in the past to providing group homes for LGBTQ+ youth and, going forward, to training all group homes on how to better serve youth. With data on guardians and foster and adoptive parents, REC could accurately assess the extent to which LGBTQ+ families are recruited and retained, advocate for more efforts if needed, and then shift its resources away from addressing congregate care and put more focus on family and community-based services, which are better for children.

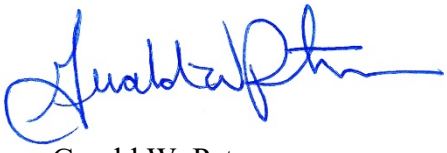
26. I have seen first-hand that requirements under federal law drive system improvement. For example, in Michigan, the child welfare and juvenile justice systems share a data collection system. Because the federal Prison Rape Elimination Act requires that juvenile facilities ask about and document information on a youth's sexual orientation and gender identity to assess their safety, Michigan's data system has fields for sexual orientation and gender identity information. These fields have been used only in the three-county pilot referenced above (Asking About SOGIE). This limited level of data collection still does not provide the full range of data needed to support policy and practice improvements. Without a federal requirement to report this data to AFCARS, and without additional resources and support from the federal government, the resources to develop and

implement a statewide plan to train workers on collecting the data and state administrators to report and interpret the data do not exist at this time. The requirements of the 2016 Rule to collect sexual orientation information (and, hopefully, associated training and technical assistance by HHS and ACF) are critical to ensuring that such data is collected for children in the child welfare system statewide as well as for guardians, foster parents, and adoptive parents. Without such data, REC's mission and services will be negatively impacted, and more importantly, I believe the disparities and harm LGBTQ+ youth in Michigan's system experience will persist.

27. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated: May 14, 2021

Respectfully submitted,



Gerald W. Peterson

EXHIBIT F

Element-By-Element Comparison of 2016 Rationale With 2019 and 2020 Rationales

Data Element: Reason to Know That A Child is an Indian Child as Defined by ICWA, 45 C.F.R. 1355.44(b)(3) (as codified in 2016)

2016 Rulemaking	2019 Proposed Rulemaking	2020 Rulemaking
Summary of Data Element: • Required agencies to report whether they had made inquiries as to child's ICWA status with the child, the child's parents, the child's Indian custodian (if any), and the extended family; • whether the child is a member or eligible for membership in a tribe; and • whether the child' residence is on a reservation. 81 FR 90535.	**2019 Proposed Action:** • Proposed to narrow element by removing the list of specific people / entities. • Proposed to require agencies to report on a yes/ no basis only whether the agency made inquiries at all. 84 FR 16579.	**2020 Action:** • Finalized as proposed in the 2019 NPRM. 85 FR 28414.
2016 Rationale for Element: • "Without inquiry, many [ICWA] children are not identified, thereby denying children, parents, and Indian tribes procedural and substantive protections under ICWA." 81 FR 20288. • Failure to adequately "research whether a child is an Indian child risks [the] children not being identified, and risks delay, expensive repetition of court proceedings, and placement instability if it is later discovered that a child is an Indian child under ICWA." 81 FR 90535. • The "data will help identify of which sources title IV– E agencies most often inquire about whether a child is an Indian child as defined in ICWA and for which sources title IV–E agencies may need resource or training to support inquiry." *Id*. Cites: 81 FR 90535; 81 FR 20288.	**Rationale for Narrowing Element:** • The "specifics of the individual people/ entities inquired with are better suited for a qualitative review because this information is too detailed for national statistics and therefore would be difficult to portray in a meaningful way." 84 FR 16579. **Discussion of 2016 Rationale**: • None provided. *See id.* Cites: 84 FR 16579.	**Rationale for Action:** • ACF "did not receive comments specific to this data element." 85 FR 28414. **Discussion of 2016 Rationale**: • None provided. *See id.* Cites: 85 FR 28414.

Data Element: Application of ICWA, 45 C.F.R. 1355.44(b)(4) (as codified in 2016)		
2016 Element: • Agencies must report whether they knew or had reason to know that ICWA applies. • If the agency answers yes, they must indicate the date they first discovered the relevant information and; • Indicate all tribe(s) with which the child may potentially be associated. 81 FR 90536.	**2019 Proposed Action:** • Proposed to narrow the element by removing requirements to report whether agency had reason to know whether ICWA applies and, if so, when they learned the relevant information. • Proposed to require agencies to report only whether a child is a member of or eligible for membership in a tribe and, if so, to list all tribe(s) with which the child may be associated. • Proposed to rename data element as "Child's Tribal Membership." 84 FR 16579.	**2020 Action:** • Finalized as proposed in the 2019 NPRM. 85 FR 28414.
Rationale for Element: • These data elements "are essential because application of ICWA triggers procedural and substantive protections and this data will provide a national number of children in the out-of-home care reporting population to whom ICWA applies." 81 FR 90536. • "The date the agency received information as to whether the child is an Indian child under ICWA is essential to understanding the time-lapse between knowing that a child is an Indian child and tribal notification. A long time-lapse can indicate a delay in the application of the ICWA protections." 81 FR 20,288. • "[I]identifying Indian tribes that may potentially be the Indian child's tribe will help tribes, states, and the federal government direct resources into developing relationships that will streamline the process of identifying Indian children." *Id*. Cites: 81 FR 90536; 81 FR 20288.	**Rationale for Narrowing Element:** • None provided. 84 FR 16579. **Discussion of 2016 Rationale:** • None provided. *See id*. Cites: 84 FR 16579.	**Rationale:** • ACF "did not receive comments specific to this data element." 85 FR 28414. **Discussion of 2016 Rationale:** • None Provided. *See id*. Cites: 85 FR 28414.

Data Element: Court Determination That ICWA Applies, 45 C.F.R. 1355.44(b)(5) (as codified in 2016)

2016 Element:	2019 Proposed Action:	2020 Action:
• Required agencies to report whether a court determined that ICWA applies by indicating ''yes, ICWA applies,'' ''no, ICWA does not apply,'' or ''no court determination.'' • If the agency indicated ''yes, ICWA applies,'' the agency was required to report the date that the court determined that ICWA applies, and; • the Indian tribe the court determined to be the Indian child's tribe. 81 FR 90536.	• Proposed to narrow the element by removing requirements to report on the court's ICWA determination and to report on the tribes that have been determined to be the child's tribe. • Proposed to require agencies to report only whether ICWA applies for the child, with a response of 'yes', 'no', or 'unknown,' and; • if yes, the date the state title IV–E agency was notified of this determination. • Proposed to rename element to "Application of ICWA." 84 FR 16579-80.	• Finalized as proposed in the 2019 NPRM. 85 FR 28414.
Rationale for Element: • "[D]ata elements related to whether ICWA applies are essential because application of ICWA triggers procedural and substantive protections[.]"81 FR 90536 • "[T]his data will provide a national number of children in the out-of-home care reporting population to whom ICWA applies." *Id.* • Identifying tribes "will help tribes, states, and the federal government direct resources into developing relationships that will streamline the process of identifying Indian children." 81 FR 20288. Cites: 81 FR 90536; 81 FR 20288.	**Rationale for Narrowing Element:** • "[C]ommenters to the ANPRM felt some of the ICWA-related data elements were redundant because they asked for similar information in multiple data elements." 84 FR 16780. **Discussion of 2016 Rationale:** • "The data we propose to collect in paragraph (b)(5) . . . will provide a national number of the children in the out-of-home care reporting population to whom ICWA applies." *Id.* • Does not address the 2016 discussion of need to identify tribes. *See id.* at 16579-80. Cites: 84 FR 16579-80.	**Rationale:** • ACF "did not receive comments specific to this data element." 85 FR 28414. **Discussion of 2016 Rationale:** • None Provided. *See id.* Cites: 85 FR 28414.

Data Element: Notification, 45 C.F.R. 1355.44(b)(6) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**
Summary of Data Element: • If ICWA applies, agencies were required to report whether the Indian child's parent or Indian custodian was sent legal notice of the child custody proceeding more than 10 days prior to the first child custody proceeding; • whether the Indian child's tribe(s) (if known) was sent legal notice of the child custody proceedings more than 10 days prior to the first child custody proceeding; • and the name(s) of the tribe(s) sent notice. 81 FR 90536.	**2019 Proposed Action:** • Proposed to narrow element by removing requirement to report on whether parents / custodians received notice, as well as requirement to report whether notice was sent more than 10 days prior to proceeding. • Proposed to only require the agency to respond with ''yes'' or ''no'' that it sent notification to the Indian tribe. 84 FR 16580.	**2020 Action:** • Finalized as proposed in the 2019 NPRM. 85 FR 28414.
2016 Rationale for Element: • "Notice . . . and the timing of the notice is an essential procedural protection provided by ICWA" because it "is critical to meaningful access to and participation in adjudications." 81 FR 20289. • "Further, improper notice is a common basis for an appeal under ICWA, resulting in failure of process and unnecessary costs and delay." *Id.* • "The data reported in this section will provide an understanding of how legal notice and adherence to the timeframes in ICWA may impact an Indian child's case." *Id.* • "The data will also help identify technology, capacity, and training needs for meeting legal notice requirements, as well as opportunities for technical assistance and relationship-building between states and tribes." *Id.* Cites: 81 FR 90536; 81 FR 20289.	**Rationale for Narrowing Element:** • None provided. *See* 84 FR 16580. **Discussion of 2016 Rationale**: • None provided. *See id.* Cites: 84 FR 16580.	**Rationale for Action:** • Noted some commenters' request to add back elements that would require reporting whether parents and custodians received notice. 85 FR 28414. • Rejected the request "because we are moving forward with requiring a streamlined set of data elements from states for identifying [ICWA children] and we do not need more details in federally reported AFCARS data related to ICWA notifications." *Id.* **Discussion of 2016 Rationale**: • None provided. *See id.* Cites: 85 FR 28414.

Data Elements: Request to Transfer to Tribal Court and Denial of Transfer, 45 C.F.R. 1355.44(b)(7), (b)(8) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**
Summary of Data Elements: • If ICWA applies, agencies were required to report whether either parent, the Indian custodian, or Indian child's tribe requested that the state court transfer the proceeding to the jurisdiction of the child's tribe. • If a transfer was requested, agencies were required to report whether the state court denied the request and, if so, the reason for the denial from a list of three options: • (1) The parents objected to the transfer; or • (2) the tribal court declined the transfer; or • (3) the state court determined good cause exists for denying the transfer to the tribal court. 81 FR 90537.	**2019 Proposed Action:** • Proposed to delete these elements entirely. 84 FR 16577.	**2020 Action:** • Deleted as proposed in the 2019 NPRM. *See* 85 FR 28410 (noting that the 2020 Final Rule "finalize[d] the . . . data elements proposed in the 2019 NPRM").
2016 Rationale for Element: • This data "will provide an understanding of how many [ICWA] children in foster care . . . are or are not transferred to the Indian child's tribe and an understanding of the reasons why a state court did not transfer the case." 81 FR 20289. • "[T]ransfer data will aid in identifying capacity needs and issues . . . that may prevent tribes from taking jurisdiction. Transfer data will help identify opportunities to build relationships between states and tribes." *Id.* • "The data will also indicate whether additional tribal court resources are needed to improve transfer rates, or additional training for state courts is required regarding appropriate 'good cause' exceptions to transfer." *Id.* Cites: 81 FR 90537; 81 FR 20289.	**Rationale for Deleting Elements:** • Stated generally that all of the deleted ICWA elements "asked for detailed information" and were "not appropriate for AFCARS." 84 FR 16577. • "We do not require reporting on the specifics of ICWA requirements as to [transfers] . . . because this information is better for a qualitative assessment that can provide context." *Id.* • Stated that other AFCARS data elements "can be used to inform a qualitative assessment" on transfers in the ICWA context. *Id.* **Discussion of 2016 Rationale**: • None provided. *See id.* Cites: 84 FR 16577.	**Rationale for Action:** • This element was not discussed at all in the 2020 Final Rule. **Discussion of 2016 Rationale**: • This element was not discussed at all in the 2020 Final Rule. Cites: 85 FR 28410.

Data Element: Involuntary Termination/Modification of Parental Rights Under ICWA, 45 C.F.R. 1355.44(c)(6) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**
Summary of Data Element: • If there was an involuntary termination or modification of parental rights ("TPR") and if ICWA applies, agencies were required to indicate whether the court found that continued custody by the parent or custodian is likely to result in serious emotional or physical damage; • whether the court decision to involuntarily terminate parental rights included the testimony of one or more qualified expert witnesses; and • whether prior to TPR, the court concluded that active efforts have been made to prevent the breakup of the Indian family. 81 FR 90546.	**2019 Proposed Action:** • Proposed to delete this element entirely. 84 FR 16577.	**2020 Action:** • Deleted as proposed in the 2019 NPRM. *See* 85 FR 28410 (noting that the 2020 Final Rule "finalize[d] the . . . data elements proposed in the 2019 NPRM").
2016 Rationale for Element: • "Congress specifically created minimum federal standards for removal of an Indian child to prevent the breakup of Indian families and to promote the stability and security of families and Indian tribes by preserving the child's links to their parents and to the tribe through the child's parent(s)." 81 FR 90546. • "Further, a TPR may affect a child's ability to be a full member of his/her tribe, preventing the child from accessing services and benefits available to tribal members." 81 FR 20291. • This data will "inform[] ACF as to when an Indian child's parental rights are terminated, helps identify the need for training and technical assistance to meet statutory standards, and highlights substantive opportunities for building relationships between states and tribes." *Id*. Cites: 81 FR 90546; 81 FR 20291.	**Rationale for Deleting Elements:** • Stated generally that all of the deleted ICWA elements "asked for detailed information" and were "not appropriate for AFCARS." 84 FR 16577. • Stated that other AFCARS data elements "can be used to inform a qualitative assessment [on TPR in the ICWA context] because these decisions are specific to each case and court action and thus need context to fully understand them." *Id.* at 16578. **Discussion of 2016 Rationale**: • None provided. *See id.* at 16577-78. Cites: 84 FR 16577-78.	**Rationale for Action:** • This element was not discussed at all in the 2020 Final Rule. **Discussion of 2016 Rationale**: • This element was not discussed at all in the 2020 Final Rule. Cites: 85 FR 28410.

Data Element: Voluntary Termination/Modification of Parental Rights Under ICWA, 45 C.F.R. 1355.44(c)(7) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**
Summary of Data Element: • If there was a voluntary termination or modification of parental rights ("TPR") and if ICWA applies, agencies were required to report whether the consent to the TPR was executed in writing and recorded before a court of competent jurisdiction with a certification by the court that the terms and consequences of consent were explained on the record in detail and were fully understood by the parent or Indian custodian. 81 FR 90547.	**2019 Proposed Action:** • Proposed to delete this element entirely. 84 FR 16577.	**2020 Action:** • Deleted as proposed in the 2019 NPRM. *See* 85 FR 28410 (noting that the 2020 Final Rule "finalize[d] the . . . data elements proposed in the 2019 NPRM").
2016 Rationale for Element: • "Congress specifically created minimum federal standards for removal of an Indian child to prevent the breakup of Indian families and to promote the stability and security of families and Indian tribes by preserving the child's links to their parents and to the tribe through the child's parent(s)." 81 FR 20291. • A "TPR may affect a child's ability to be a full member of [their] tribe, preventing the child from accessing services . . . [for] members." *Id.* • This data will "inform[] ACF as to when an Indian child's parental rights are terminated, help[] identify the need for training and technical assistance to meet statutory standards, and highlight[] substantive opportunities for building relationships between states and tribes." *Id.* Cites: 81 FR 90547; 81 FR 20291.	**Rationale for Deleting Element:** • Stated generally that all of the deleted ICWA elements "asked for detailed information" and were "not appropriate for AFCARS." 84 FR 16577. • Stated that other AFCARS data elements "can be used to inform a qualitative assessment [on TPR in the ICWA context] because these decisions are specific to each case and court action and thus need context to fully understand them." *Id.* at 16578. **Discussion of 2016 Rationale**: • None provided. *See id.* at 16577-78. Cites: 84 FR 16577-78.	**Rationale for Action:** • This element was not discussed at all in the 2020 Final Rule. **Discussion of 2016 Rationale**: • This element was not discussed at all in the 2020 Final Rule. Cites: *See* 85 FR 28410.

Data Element: Removals Under ICWA, 45 C.F.R. 1355.44(d)(3) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**
Summary of Data Element: • If ICWA applies, agencies were required to report whether the court order for foster care placement was made as a result of clear and convincing evidence that continued custody by the parent or Indian custodian was likely to result in serious emotional or physical damage; • whether the evidence presented included the testimony of a qualified expert witness; and • whether the evidence presented indicates that active efforts have been made to prevent the breakup of the Indian family and that those efforts were unsuccessful. 81 FR 90547.	**2019 Proposed Action:** • Proposed to delete this element entirely. 84 FR 16577.	**2020 Action:** • Deleted as proposed in the 2019 NPRM. *See* 85 FR 28410 (noting that the 2020 Final Rule "finalize[d] the . . . data elements proposed in the 2019 NPRM").
2016 Rationale for Element: • ICWA's removal requirements are designed to "prevent the continued breakup of Indian families. ICWA's legislative history reflects clear Congressional intent: . . . 'Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.'" 81 FR 20289. • "[T]he removal data elements will provide data on the extent to which Indian children as defined in ICWA are removed in a manner that conforms to ICWA's standards, inform[] ACF about the frequency of and evidentiary standards applied to removals of Indian children, help[] identify needs for training and technical assistance related to ICWA, and highlight[] substantive opportunities for building and improving relationships between states and tribes." 81 FR 90548. Cites: 81 FR 90547-48; 81 FR 20289.	**Rationale for Deleting Element:** • Stated generally that all of the deleted ICWA elements "asked for detailed information" and were "not appropriate for AFCARS." 84 FR 16577. • Did not provide a rationale specific to this element. *See id.* **Discussion of 2016 Rationale**: • None provided. *See id.* Cites: 84 FR 16577.	**Rationale for Action:** • This element was not discussed at all in the 2020 Final Rule. **Discussion of 2016 Rationale**: • This element was not discussed at all in the 2020 Final Rule. Cites: 85 FR 28410.

Data Element: Available ICWA Placements, Placement Preferences Under ICWA, Good Cause Under ICWA, and Basis for Good Cause, 45 C.F.R. 1355.44(e)(8)-(11) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**

Summary of Data Elements:
• If ICWA applies, agencies were required to indicate which of the following foster care and pre-adoptive placements were willing to accept placement of the Indian child:
  ○ A member of the extended family;
  ○ a foster home licensed or approved by the child's tribe;
  ○ an Indian foster home licensed by a non-Indian licensing authority;
  ○ an institution for children approved by the tribe or operated by an Indian organization with a program suitable to meet the child's needs; and
  ○ a placement that complies with the order of preference for placements established by an Indian child's tribe
• Agencies were also required to report whether child's actual placement(s) complied with ICWA's placement preferences.
• If not, agency was required to report whether the court determined that there was good cause for departing from the preferences and, if so, to indicate the court's basis for good cause from a list of five response options. 81 FR 90552-53.
	2019 Proposed Action:
	• Proposed to delete these four elements entirely. 84 FR 16577.
		2020 Action:
		• Deleted as proposed in the 2019 NPRM. *See* 85 FR 28410 (noting that the 2020 Final Rule "finalize[d] the . . . data elements proposed in the 2019 NPRM").

2016 Rationale for Elements: • Placement preferences "promote the stability and security of families and Indian tribes by keeping Indian children with their extended families or in Indian foster homes and communities." 81 FR 20290. Continued on Next Page.	**2019 Rationale for Deleting Elements:** • Stated generally that all of the deleted ICWA elements "asked for detailed information" and were "not appropriate for AFCARS." 84 FR 16577. Continued on Next Page.	**2020 Rationale for Action:** • This element was not discussed at all in the 2020 Final Rule. Continued on Next Page.

• "The availability of foster care placements that meet ICWA's preferences is critical for meeting the purposes of ICWA." 81 FR 90552. • "[T]hese data elements will allow ACF to distinguish between cases in which there was no available ICWA-preferred placement and those cases where an available ICWA-preferred placement was not used despite its availability." 81 FR 20290. • "Reporting information on good cause will help agencies better understand why the ICWA placement preferences are not followed." *Id.* • "This information is essential for ACF to determine whether resources are needed for recruitment to increase the availability of AI/AN homes that can meet ICWA's placement preferences." 81 FR 90552. • "This information will help to identify the training and technical assistance needs of states to support recruitment and support foster families to meet the unique cultural, social, extracurricular, and linguistic needs of Indian children." 81 FR 20290. Cites: 81 FR 90552; 81 FR 20290.	• Stated that other data elements required by AFCARS "can be used to inform a qualitative assessment that will allow context, because placement decisions are specific to the child's needs." *Id.* **Discussion of 2016 Rationale**: • None provided. *See id*. Cites: 84 FR 16577.	**Discussion of 2016 Rationale**: • This element was not discussed at all in the 2020 Final Rule. Cites: 85 FR 28410.

Data Element: Active Efforts, 45 C.F.R. 1355.44(f)(10) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**
Summary of Data Element: • If ICWA applies, agencies were required to indicate whether a list of thirteen different "active efforts"—which are designed to prevent the breakup of Indian families and to help reunite families—were provided prior to and during a child's stay in out-of-home care. 81 FR 90556.	**2019 Proposed Action:** • Proposed to delete this element entirely. 84 FR 16577.	**2020 Action:** • Deleted as proposed in the 2019 NPRM. *See* 85 FR 28410 (noting that the 2020 Final Rule "finalize[d] the . . . data elements proposed in the 2019 NPRM").
2016 Rationale for Element: • ICWA's requirement that agencies make active efforts to prevent the breakup of the family "provide[s] a critical protection against the removal and TPR of an Indian child from a fit and loving parent by ensuring that parents . . . are provided with service necessary to retain or regain custody of their child." 81 FR 90556. • "[D]ata regarding active efforts will provide a better understanding of the status of Indian children in foster care, how these efforts may impact an Indian child's case, and the role of the courts in making findings." 81 FR 20289. • "The data will also help identify service needs and efficacy; capacity needs; the need for training and technical assistance; and opportunities to build relationships between states and tribes." *Id.* • "Data about the frequency [of] each active effort type . . . will help develop policy, resources, and technical assistance to support states to employ a range of efforts that can meet the needs of Indian children[.]"81 FR 90556. Cites: 81 FR 90556; 81 FR 20289.	**Rationale for Deleting Element:** • Stated generally that all of the deleted ICWA elements "asked for detailed information" and were "not appropriate for AFCARS." 84 FR 16577. • Did not provide a rationale specific to this element. *See id.* **Discussion of 2016 Rationale**: • None provided. *See id*. Cites: 84 FR 16577.	**Rationale for Action:** • This element was not discussed at all in the 2020 Final Rule. **Discussion of 2016 Rationale**: • This element was not discussed at all in the 2020 Final Rule. Cites: 85 FR 28410.

Data Elements: Available ICWA Adoptive Placements; Adoption Placement Preferences Under ICWA; Good Cause Under ICWA; Basis For Good Cause, 45 C.F.R. 1355.44(h)(20)-(23) (as codified in 2016)		
2016 Rulemaking	**2019 Proposed Rulemaking**	**2020 Rulemaking**

Summary of Data Elements:
• If ICWA applies, agencies were required to indicate which of the following adoptive placements were willing to accept placement of the child:
  ○ A member of the extended family;
  ○ Other members of the child's tribe;
  ○ Other Indian families; and
  ○ A placement that complies with the preferences for adoptive placements established by the child's tribe.
• Agencies were also required to report whether child's actual placement(s) complied with ICWA's placement preferences.
• If not, agency was required to report whether the court determined that there was good cause for departing from the preferences and, if so, to indicate the court's basis for good cause from a list of five response options. 81 FR 90560-61.
	2019 Proposed Action:
	• Proposed to delete these four elements entirely. 84 FR 16577.
		2020 Action:
		• Deleted as proposed in the 2019 NPRM. *See* 85 FR 28410 (noting that the 2020 Final Rule "finalize[d] the . . . data elements proposed in the 2019 NPRM").

2016 Rationale for Elements: • Placement preferences "promot[e] the stability and security of families and Indian tribes by keeping adopted Indian children with their extended families, tribes or communities." 81 FR 20291. • ACF explained that these data elements will: "assist in identifying trends or problems that may require enhanced recruitment of potential Indian adoptive homes"; Continued on Next Page.	**2019 Rationale for Deleting Elements:** • Stated generally that all of the deleted ICWA elements "asked for detailed information" and were "not appropriate for AFCARS." 84 FR 16577. • Stated that other data elements required by AFCARS "can be used to inform a qualitative assessment that will allow context, because placement decisions are specific to the child's needs." *Id.* Continued on Next Page.	**Rationale for Action:** • This element was not discussed at all in the 2020 Final Rule. Continued on Next Page.

• "allow ACF to distinguish between ICWA cases in which there was no available ICWA placement and those cases where an available ICWA-placement was not used"; and • "help to identify the scope of resources for . . . technical assistance needed for states to recruit and support adoptive families to meet the unique cultural, social, and enrichment activity needs of Indian children." *Id.* • "Reporting information on good cause to not follow . . . placement preferences will help to understand why the . . . placement preferences are not followed, and will aid in identifying . . . training and resource needs[.]" *Id.* • ACF rejected concerns that these data elements were too subjective, explaining that "whether a home is available is not a subjective . . . determination but rather is evidence offered by the . . . agency to the court that there is good cause to deviate from ICWA's placement preferences in a particular case[.]" 81 FR 90560. • "This information is essential for ACF to determine whether resources are needed for recruitment to increase the availability of AI/AN homes that can meet ICWA's placement preferences for adoption." *Id*. • "As we indicated in the preamble to the 2016 SNPRM, reporting information on good cause will help agencies better understand why the ICWA placement preferences are not followed. In addition, such information will aid in targeting training and resources needed to assist states in improving Indian child outcomes." *Id.* Cites: 81 FR 90560-61; 81 FR 20291.	**Discussion of 2016 Rationale**: • None provided. *See id.* Cites: 84 FR 16577.	**Discussion of 2016 Rationale**: • This element was not discussed at all in the 2020 Final Rule. Cites: 85 FR 28410.

Summary of Federal Register Cites For Each Narrowed or Deleted ICWA Data Element

ICWA Data Element	2016 SNPRM	2016 Final Rule	2019 NPRM	2020 Final Rule
Reason to Know That A Child is an Indian Child as Defined by ICWA*	81 FR 20288	81 FR 90535	84 FR 16579	85 FR 28414
Application of ICWA*	81 FR 20288	81 FR 90536	84 FR 16579	85 FR 28414
Court Determination that ICWA Applies*	81 FR 20288	81 FR 90536	84 FR 16579-80	85 FR 28414
Notification*	81 FR 20289	81 FR 90536	84 FR 16580	85 FR 28414
Request to Transfer to Tribal Court**	81 FR 20289	81 FR 90537	84 FR 16777	No discussion
Denial of Transfer**	81 FR 20289	81 FR 90537	84 FR 16777	No discussion
Involuntary Termination/Modification of Parental Rights Under ICWA**	81 FR 20291	81 FR 90546	84 FR 16577-78	No discussion
Voluntary Termination/Modification of Parental Rights Under ICWA**	81 FR 20291	81 FR 90547	84 FR 16577-78	No discussion
Removals Under ICWA**	81 FR 20289	81 FR 90547-48	No discussion	No discussion
Available ICWA Foster Care and Pre-Adoptive Placements Preferences**	81 FR 20290	81 FR 90552	84 FR 16777	No discussion
Foster Care and Pre-Adoptive Placement Preferences Under ICWA**	81 FR 20290	81 FR 90552	84 FR 16777	No discussion
Good Cause Under ICWA**	81 FR 20290	81 FR 90553	84 FR 16777	No discussion
Basis for Good Cause**	81 FR 20290	81 FR 90553	84 FR 16777	No discussion
Active Efforts**	81 FR 20289	81 FR 90556	No discussion	No discussion
Available ICWA Adoptive Placements**	81 FR 20291	81 FR 90560	84 FR 16777	No discussion
Adoption Placement Preferences Under ICWA**	81 FR 20291	81 FR 90560	84 FR 16777	No discussion
Good Cause Under ICWA**	81 FR 20291	81 FR 90560	84 FR 16777	No discussion
Basis for Good Cause**	81 FR 20291	81 FR 90560-61	84 FR 16777	No discussion

* Data element was narrowed by the 2020 Final Rule.
** Data element was deleted by the 2020 Final Rule.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CALIFORNIA TRIBAL FAMILIES COALITION, YUROK TRIBE, CHEROKEE NATION, FACING FOSTER CARE IN ALASKA, ARK OF FREEDOM ALLIANCE, RUTH ELLIS CENTER, and TRUE COLORS, INC.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, JOOYEUN CHANG, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, and ADMINISTRATION FOR CHILDREN AND FAMILIES,

Defendants.

Case No. 20-cv-6018 (MMC)

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is Plaintiffs' Motion for Summary Judgment against Defendants Xavier Becerra, in his official capacity as Secretary of Health and Human Services; Jooyeun Chang, in her official capacity as Acting Assistant Secretary for the Administration for Children and Families; the U.S. Department of Health and Human Services; and the Administration for Children and Families (collectively, "Defendants"). Plaintiffs have moved for summary judgment on Count I of their Complaint against Defendants under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), for issuing a rulemaking that is contrary to their statutory obligations under the Social Security Act, 42 U.S.C. § 679(c)(3), and for failing to provide adequate reasoned analysis; properly balance costs and benefits; consider and respond to comments; consider all relevant statutory factors; acknowledge that no underlying facts had changed since 2016; explain inconsistencies between their position and the full record of research and policy findings before it; and acknowledge or justify their changes in position.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where the questions are purely legal in nature, a court can resolve a challenge to a federal agency's action on a motion for summary judgment. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). "Generally, judicial review of agency action is limited to review of the record on which the administrative decision was based." *Zieroth v. Azar*, No. 20-cv-172, 2020 WL 5642614, at *1 (N.D. Cal. Sept. 22, 2020) (quoting *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). "A reviewing court can, however, 'go outside the administrative record . . . for the limited purpose of background information.'" *Id.*

III. DISCUSSION

Under the APA, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See also East Bay Sanctuary Covenant v. Biden*, 933 F.3d 640, 681 (9th Cir. 2021) ("[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated[.]" (internal quotation omitted)).

Here, Defendants' issuance of the 2020 Final Rule on the Adoption and Foster Care Analysis and Reporting System, 85 Fed. Reg. 28,410 (May 12, 2020), is not in accordance with law because Defendants refused to collect demographic data regarding sexual orientation, as required by the Social Security Act. 42 U.S.C. § 679(c)(3) (requiring Defendants to collect "comprehensive national information with respect to . . . the demographic characteristics of adoptive and foster children and their biological and adoptive or foster parents"); Pls.' Mot. for Summ. J. at 20.

The 2020 Final Rule is also arbitrary and capricious. To begin, Defendants failed to consider an important aspect of a problem, offered explanations for the rule that are contrary to the evidence, and provided rationales that were so implausible that they could not be ascribed to a difference in view or be the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see* Pls.' Mot. for Summ. J. at 23-28. Further, Defendants reversed their prior position without "display[ing] awareness that [they were] changing position," "show[ing] that there are good reasons for the new policy," and providing "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515-16 (2009)); *see* Pls.' Mot. for Summ.

J. at 22-23, 26-30. Finally, Defendants failed to "consider and respond to significant comments." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); Pls.' Mot. for Summ. J. at 23-24, 27, 30.

Accordingly, summary judgment is appropriate for Plaintiffs and the 2020 Final Rule should be vacated.

IV. CONCLUSION

For the foregoing reasons, the Court's ruling is as follows:

Plaintiffs' motion for summary judgment against Defendants on Count I of Plaintiffs' Complaint is GRANTED; and it is further

DECLARED that the 2020 Final Rule violates the Administrative Procedure Act and the Social Security Act; and

ORDERED that the 2020 Final Rule is vacated.

IT IS SO ORDERED.

DATED: _____

_____
HONORABLE MAXINE M. CHESNEY
United States District Judge